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Cases and Readings

ON THE

Jurisdiction and Procedure of the Federal Courts

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TO
PROFESSOR GEORGE WELLS KNIGHT
TO WHOSE HELPFULNESS AND INSPIRATION
THIS VOLUME IS A SLIGHT BUT
EARNEST TRIBUTE.

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PREFACE

Although the jurisdiction of the federal courts is largely a matter of statute, and is in the main based on an elaborate code, yet approaching the subject through the cases seems as highly desirable and yields the same good results as are noticed in other branches of the law.

The traditional method of dealing with the subject has been by lectures and text book, but the scope of the subject and the wealth of cases has shown the possibility of pursuing the case treatment.

The arrangement is such as to present the historical viewpoint; for, though the statutes have undergone frequent change, the main outlines have been retained about as laid down in 1789, and important changes, like the Act of 1891, have apparently long since become permanent features of the system.

As to procedure, many of the cases on jurisdiction raise and discuss procedural matters, and it is the thought that the student will make careful note of them, and that class discussion will be accorded to them. The abbreviated transcripts of records will furnish the basis for an intensive study; they may be supplemented by records of cases in the various federal courts which may be obtained in limited numbers from the clerks on request.

It has been thought wise to omit from a book of this character the large special subjects: bankruptcy, admiralty and maritime jurisdiction and patents. They receive adequate treatment in separate courses of the curriculum.

The Federal Judicial Code of 1911, with amendments, annotated, may be obtained from the superintendent of documents of the United States, and is expected to be in the hands of the student. The appendix therefore contains only those enactments of chief importance which are not readily available to the student in convenient form.

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SIMONTON—Federal Courts.
STORY—Commentaries.
STREET—Federal Equity Practice.
WHITEHOUSE—Equity Practice, State and Federal.

Federal Courts—Their Jurisdiction and Procedure

A. IN GENERAL.

1. DEFINITIONS.

a. Jurisdiction. Jurisdiction is the power to hear and determine. *Cornett v. Williams*, 20 Wall. 249.

Jurisdiction is authority to decide the case either way. *The Fair v. Kohler Die Co.*, 228 U. S. 25.

Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials:

First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect within the issue. *Munday v. Vail*, 34 N. J. L. 422 [quoted with approval in *Reynolds v. Stockton*, 140 U. S. 268].

Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of

error or appeal, or impeached for fraud. *Foltz v. St. L. & S. F. Ry.*, 8 C. C. A. 637, 60 Fed. 316.

See also, *Hartog v. Memory*, 116 U. S. 588; *Metcalf v. Watertown*, 128 U. S. 586, for specific applications of question of jurisdiction.

b. Suit. What is a suit?

We understand it to be prosecution or pursuit of some claim, demand, or request; in law language, it is the prosecution of some demand in a court of justice. * * * To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand. C. J. Marshall, in *Cohens v. Virginia*, 6 Wheaton, 407, 408.

Is the writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court, and, at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals, and in the highest court the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit. C. J. Marshall, in *Weston v. City Council*, 2 Pet. 449.

In any legal sense, action, suit and cause are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for that purpose was his "cause" "or suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer because, without fault of his, they were unable to render a judgment. * * * When Milligan demanded his release by the proceeding

relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. * * * The court do not say that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a suit—the suit of the party making the application. *Ex parte Milligan*, 4 Wall. 2.

IN RE STUTSMAN COUNTY.

Reported in 88 Federal, 337.
(1898.)

AMIDON, District Judge: Chapter 67 of the Laws of 1897 of the state of North Dakota, makes provision for the collection of delinquent taxes by a proceeding in the district court. The enactment is taken from a statute that has long been in force in the state of Minnesota. Section 1 provides that the county treasurer shall make a list of all taxes upon real estate in his county which have been delinquent for certain years. The list is required to contain a description of the parcels of land upon which the taxes have not been paid, and opposite such description the name of the owner to whom assessed, if known, and the amount of the tax, with penalty and interest. Such list is to be verified by the affidavit of the treasurer, and is then filed in the office of the clerk of the district court of the county. "The filing of such list shall have the force and effect of the filing of a complaint in an action by the county against each piece or parcel of land in such list described, to enforce against it the taxes therein appearing against it, and the penalties and interest for the several years for which such taxes shall remain unpaid, and to obtain a judgment or decree of the court for the sale of such piece or parcel of land to satisfy the amount of such taxes remaining unpaid, with penalties, interest and costs, and also the effect of notice of the pendency of such action, to all persons interested in such lands."

"Jurisdiction of this court is resisted upon the grounds: First, that the proceeding for the collection of delinquent taxes provided by the statute of North Dakota is not a 'suit' within the meaning of the Act of 1887 and 1888; second,

that such proceeding, if it is a suit, is not a suit of which the federal courts are given original jurisdiction;" * * *

It "involves the determination of questions of law and fact, and there are parties litigant to contest the case on the one side and on the other." *Upshur Co. v. Rich*, 135 U. S. 467, 477, 10 Sup. Ct. 654. "A claim of the parties, capable of pecuniary estimation, is the subject of the litigation, and is presented by the pleadings for judicial determination. *Gaines v. Fuentes*, 92 U. S. 10-20; *Pacific Railroad Removal Cases*, 115 U. S. 10, 5 Sup. Ct. 1113. It has been expressly held by the supreme courts of Minnesota and North Dakota that the proceeding under this statute is a suit, and the same conclusive force is given to a judgment entered therein as to judgments and decrees in actions at law and suits in equity. *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, and 30 N. W. 826; *Wells Co. v. McHenry* (N. D.), 74 N. W. 241. It is difficult to appreciate the force of that reasoning which attaches to a proceeding in court, as to its effect upon the rights of the parties, all the consequences of a suit, but, for the purpose of determining the jurisdiction of the federal courts, holds the same proceeding to be purely administrative.

In support of the ground for the motion to remand, now under consideration, counsel rely mainly upon the case entitled *In re City of Chicago*, 64 Fed. 897. Whether that case was correctly decided must depend upon the effect to which the judgment of the county court, upon the report of the commissioners in the proceeding there under review is entitled. The supreme court of Illinois has repeatedly passed upon that question, and has uniformly held that such judgments possess the same force as judgments in ordinary civil actions, and are open to collateral attack only upon the ground that the court failed to acquire jurisdiction. They conclusively establish all matters affecting the validity of the assessment which precede their rendition, and forever bar a defendant from again litigating any matter which he might have presented by answer. *Lehmer v. People*, 80 Ill. 601; *Clark v. People*, 146 Ill. 348, 35 N. E. 60. It is true, as stated in the opinion in 64 Fed. 899, that the power of taxation is, as to its source, legislative, and, as to its exercise, administrative;

but the power of finally determining the validity of a tax is judicial. Before the property of a citizen can be taken, or conclusively charged with liability for a tax, he has the right to a judicial determination of two questions: First, whether the law authorizing the tax is a constitutional exercise of the legislative power; and, second, whether the administrative officers, in imposing the tax, have pursued the authority vested in them by the statute. The determination of these questions by a judgment which can only be assailed by writ of error or appeal is judicial. It can make no difference whether such determination is made in the course of a proceeding by the county or municipality to levy or enforce the tax, or in a proceeding by the owner of the property to defeat it. A judgment which conclusively determines a right of obligation, so that the same matter can not be further litigated, except by writ of error or appeal, is an exercise of judicial power; and a proceeding in a court of common law or equity, which culminates in such a judgment, is a "suit" within the meaning of the federal judiciary acts. Any other determination exalts matters of form above those of substance. Inasmuch, therefore, as the proceeding under the Illinois statute terminates in a judgment having this conclusive force, it would seem that it ought to be regarded as a suit for the purpose of determining the jurisdiction of federal courts.

c. Controversy and case. In *Osborn v. Bank*, 9 Wh. 738, at p. 819, C. J. Marshall says: This clause (Constitution, Article III, Section 2, Clause 1) enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

Story on the Constitution, at Section 1646, says: Another inquiry may be, what constitutes a case within the meaning of this clause? It is clear that the judicial depart-

ment is authorized to exercise jurisdiction to the full extent of the constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws or treaties of the United States, it is within the judicial power confided to the Union.

In re Pacific Ry. Com'n, 32 Fed. 241, J. Field says at p. 255: The judicial article of the constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432, 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

In *King v. McLean Asylum of Massachusetts General Hospital*, 64 Fed. 331, at p. 335, J. Putman says: But the appellees rely on a supposed distinction between the use of the word "cases" and the word "controversies" in the section of the constitution defining the federal judicial power. That section uses the word "cases" in the first three clauses, namely, "cases in law and equity" arising under the constitution and the laws and treaties of the United States,

“cases affecting ambassadors, other public ministers and consuls,” and “cases of admiralty and maritime jurisdiction.” So far it has relation mainly, although not entirely, to the subject-matter of the litigation, and not the parties involved.

It then changes to the word “controversies,” and uses this with reference to “controversies between two or more states,” and then, without repeating the word, continues, “between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.” The eleventh amendment to the constitution, which limits the judicial power of the United States with reference to the states, provides that it shall not extend “to any suit” of the class described in it. As to the change in phraseology found in this amendment, the supreme court very soon—that is, in 1821—in *Cohens v. Virginia*, 6 Wheat. 264, after great deliberation, determined in effect that the word “suit” is not so broad as the word “controversy,” because the court maintained its jurisdiction on a writ of error, although the defendant was the state of Virginia; pointing out carefully that a proceeding in error is not a suit, although it can not be denied that it is a controversy. Mr. Justice Iredell, in *Chisholm v. Georgia*, 2 Dall. 419, 431, 432, distinguished between the word “controversies” and the word “cases” in this connection, by confining the former to such as are of a civil nature; and Mr. Justice Story, in the first edition of his Commentaries on the Constitution, both in the text at Section 1634 and in the note to Section 1668, recognized the possibility of this distinction, but did not positively approve or disapprove it. It has been suggested that the word “all” used in connection with the word “cases,” and omitted in connection with the word “controversies,” has peculiar force. This does not seem well sustained, but if it were, it would not touch the question we are considering. The change under consideration, from the word “cases” to the word “controversies” will be found to have been a mere matter of style, and to have no relation to any limitation or extension of the class of questions to be adjudicated. As we have already said, so long as this section

of the constitution speaks especially with reference to the nature of the questions involved, it uses the word "cases," but when it considers more particularly proceedings having relation to the existence of parties, it uses the word "controversies," probably because, when parties are spoken of as arrayed against each other, literary style suggested the change. A lengthy examination of its history is excusable, because of the interesting character of the topic, and of the clear result to which it brings us.

For further discussion, see same case, p. 336, *et seq.*

Also see *Smith v. Adams*, 130 U. S. 167, and *Interstate Com. Com'n. v. Brimson*, 154 U. S. 447.

2. CONSTITUTIONAL PROVISIONS.

ARTICLE III, SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

AMENDMENT, ARTICLE 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

3. SYSTEM.

a. Courts of general jurisdiction.

(a) District courts. Created by Act of September 24, 1789. 1 Stat. L., p. 73, Ch. 20.

(b) Circuit courts. Created by Act of September 24, 1789, 1 Stat. L., p. 74, Ch. 20, and abolished by Act of March 3, 1911, 36 Stat. L., p. 1167, Ch. 231, and their jurisdiction conferred upon the district courts.

(c) Circuit courts of appeals. Created by Act of March 3, 1891, 26 Stat. L., p. 826, Ch. 517.

(d) Supreme court. Constitutional, but provided for in Act of September 24, 1789, 1 Stat. L., p. 73, Ch. 20.

b. Courts of special jurisdiction.

(a) Court of claims. Created by Act of February 24, 1855, 10 Stat. L., p. 612, Ch. 122.

(b) Court of private land claims. Created by Act of March 3, 1891, 26 Stat. L., p. 854, Ch. 539, and abolished by Act of March 3, 1903, 32 Stat. L., p. 144, Ch. 1007.

(c) Court of customs appeals. Created by Act of August 5, 1909, 36 Stat. L., p. 105, Ch. 6.

(d) Commerce court. Created by Act of June 18, 1910, 36 Stat. L., p. 539, Ch. 309, and abolished by Act of October 22, 1913, 38 Stat. L., p. 219, Ch. 32.

4. EXCLUSIVE JURISDICTION.

Judicial Code, 1911, Section 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls. (36 Stat. L., 1160.)

5. LAW AND EQUITY.

See Judicial Code, Section 267.

BUZARD v. HOUSTON.

Reported in 119 U. S. 347.
(1886.)

THIS was a bill in equity. * * * MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court:

In the Judiciary Act of 1789, by which, the first congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Act of September 24, 1789, c. 20, 1 Stat. 82; Rev. Stat. 723. Five days later, on September 29, 1789, the same congress proposed to the legislatures of the several states the article afterwards ratified as the seventh amend-

ment of the constitution, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." 1 Stat. 21, 98.

The effect of the provision of the Judiciary Act, as often stated by this court, is that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff may proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp v. Babin*, 19 How. 271, 278; *Insurance Co. v. Bailey*, 13 Wall. 616, 621; *Grand Chute v. Winegar*, 15 Wall. 373, 375; *Lewis v. Cocks*, 23 Wall. 466, 470; *Root v. Railway Co.*, 105 U. S. 189, 212; *Killian v. Ebbinghaus*, 110 U. S. 568, 573. In a very recent case the court said: "This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts." *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214.

Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common law side, as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law; as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits, as in *Boyce v. Grundy*, 3 Pet. 210, 215, and in *Jones v. Bolles*, 9 Wall. 364, 369.

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Parkersburg v. Brown*, 106 U. S. 487, 500; *Ambler v. Choteau*, 107 U. S. 586; *Litchfield v. Ballou*, 114 U. S. 190.

In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this, as clearly brought out by Lords Justices Knight, Bruce and Turner in *Slim v. Croucher*, 1 D. F. & J. 518, 527, 528, was that such cases were within the ancient and original jurisdiction in chancery, before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery. Upon any other ground, such bills could not be maintained. *Clifford v. Brooks*, 13 Ves. 131; *Thompson v. Barclay*, 9 Law Journal (Ch.) 215, 218. And we have not been referred to any instance in which an English court of equity has maintained a bill in such a case as that now before us. In *Newham v. May*, 13 Price, 749, Chief Baron Alexander said: "It is not in every case of fraud that relief is to be administered by a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend ever thought of filing a bill in equity."

The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate, and complete remedy. The original agreement for the sale of a number of cattle, and not of any cattle in particular, does not belong to the class of contracts of which equity would decree specific performance. If the plaintiffs should be ordered to be reinstated in all their rights under that agreement and permitted now to tender performance thereof on their part, the only relief which they could have in this suit would be a decree for damages to be assessed by the same rules as in an action at law. The similar contract with Mosty and the assignment thereof to the plaintiffs are in the plaintiff's own possession, and no judicial rescission of the assignment is needed. If the exchange of the contracts was procured by the fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action of deceit the plaintiffs might treat the assignment of

the contract with Mosty, as void, and, upon delivering up that contract to the defendant, recover full damages for the non-performance of the original agreement. No relief is sought against Mosty, and he is not made a party to the bill. The obligation executed by the plaintiffs to the defendant is not negotiable, so that there is no need of an injunction. A judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled. There is therefore no ground upon which the bill can be maintained. *Insurance Co. v. Bailey*, 13 Wall. 616, and other cases above cited.

GREEN v. MILLS.

Reported in 16 C. C. A. (U. S.), 516.
(1895.)

FULLER, Circuit Justice: The jurisprudence of the United States has always recognized the distinction between common law and equity as, under the constitution, matter of substance as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481, 484; *Thompson v. Railroad Cos.*, 6 Wall. 134; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 14 Sup. Ct. 75. It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of the government, unless under special circumstances, and when necessary to the protection of rights or property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall. 475; *Georgia v. Stanton*, 6 Wall. 50; *Homes v. Oldham*, 1 Hughes, 76. Fed. Cas. No. 6, 643. "Neither the legislature nor the executive department," said Chief Justice Chase, in *Mississippi v. Johnson*, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper case, subject

to its cognizance.” “The office and jurisdiction of a court of equity,” said Mr. Justice Gray, *In re Sawyer*, “unless enlarged by express statute, are limited to the protection of rights of property.” To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law. * * *

Nor will equity interfere by injunction to restrain persons from exercising the functions of public officers, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. The doctrine is clearly established that courts of equity will not thus interfere to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law. High, *Inj.* (3rd Ed.) 1312, *et seq.*, and cases cited. And see *Hagner v. Heyberger*, 7 Watts & S. 104; *Smith v. McCarthy*, 56 Pa. St. 359; *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692; *Peck v. Weddell*, 17 Ohio St. 271; *Kemp v. Ventulett*, 58 Ga. 419. The rule is not otherwise in South Carolina. The supreme court of that state has decided upon a similar application for a like injunction, made, as would appear, by this same complainant, that the relief asked “is not the appropriate remedy for the grievance set out.” *Ex parte Mills*, 41 S. C. 554, 19 S. E. 749.

Tested by these principles, this bill of complaint can not be maintained, for it seeks on behalf of individuals to restrain the exercise of governmental powers, and asserts no threatened infringement of rights of property or civil rights, and no recognized ground of equity interposition. No discrimination on account of race, color, or previous condition of servitude is charged or pointed out as deducible on the face of the acts in question. No specific application to the defendant as supervisor to register complainant is alleged, but it is said that complainant has failed to register because, in spite of repeated and persistent efforts to that end, he found himself unable to comply with the provisions of the law in that behalf. In this regard, the gravamen of the bill is that, although the legislature might require registration under reasonable restric-

tions as proof of the possession of the qualifications prescribed by the constitution, which is, indeed, made the duty of the general assembly by that instrument (Const. S. C., Art. 8, 3), the requirements of these acts are such as to materially abridge and impair the exercise of the elective franchise and impose additional qualifications to those prescribed; and that therefore the acts are invalid, as in contravention of the constitutions of the state and of the United States. But, if this were true, it would not follow that complainant would have a *locus standi* in equity. The bill is brought to restrain the registering officer from discharging, at all, duties imposed upon him by law in respect of the public, lest complainants and other individuals similarly situated might thereafter be deprived of a political right because of alleged inability to comply with legislative requirements, which he contends are invalid for that reason. We repeat that the action sought to be enjoined is political and governmental, and it is not pretended that any right of property or civil right is threatened with infringement thereby.

This being so, we are clearly of opinion that no ground of equitable cognizance exists, and, although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill can not be maintained, we are constrained, in reversing these orders, to remand the cause with a direction to dismiss the bill. And it is so ordered.

ROBINSON v. CAMPBELL.

Reported in 3 Wheaton, 212.

(1818.)

Todd, Justice, delivered the opinion of the court: The question then is, whether, in the circuit courts of the United States, a merely equitable title can be set up as a defense in an action of ejectment? * * *

There is a more general view of this subject, which deserves consideration. By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature, at common law and in equity, in cases which fall within the limits prescribed by those laws. By the thirty-fourth section of the Judiciary Act of 1789, it is provided, that the laws of the

several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply. The Act of May, 1792, confirms the modes of proceeding then used in suits at common law, in the courts of the United States, and declares, that the modes of proceeding in suits of equity, shall be "according to the principles, rules and usages which belong to courts of equity as contradistinguished from courts of common law," except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider, whether it was the intention of congress, by these provisions, to confine the courts of the United States, in their mode of administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention, to give the party relief at law, where the practice of the state courts would give it, and relief in equity only when, according to such practice, a plain, adequate and complete remedy could not be had at law. In some states in the Union, no court of chancery exists, to administer equitable relief. In some of those states, courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities, at law. A construction, therefore, that would adopt the state practice, in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that, where by the

statutes of a state, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is, under circumstances of an equitable nature, declared by such statutes to be void, the rights of the parties, in such case, may be as fully considered, in a suit at law, in the courts of the United States, as they would be in any state court. In either view of this first point, the court is of opinion, that the circuit court decided right, in rejecting the evidence offered by the original defendant. It was matter proper for the cognizance of a court of equity, and not admissible in a suit at law. * * *

Suit in ejectment, based upon a showing of equitable title only, can not be maintained in the federal courts, the distinction between law and equity being carefully preserved: *Fenn v. Holme*, 21 Howard, 481.

See 38 Stat. L., p. 956, Act March 3, 1915, providing for equitable defenses in actions at law; Judicial Code, Section 274b.

CLARK v. SMITH.

Reported in 13 Peters, 195.
(1839.)

THE question here is as to the enforcement in the federal courts of a right in equity created by statute of Kentucky; the circuit court being divided on the question of jurisdiction the bill was dismissed, and appeal was taken.

CATRON, Justice, delivered the opinion of the court: * * * The legislature having declared that he who has the legal and equitable title, and the possession, may treat the adverse claimant as a trustee, and coerce a release to himself of the inferior claim, of course, the statute secures a highly valuable right, which it is the duty of the court to enforce, and which can only be enforced in a court of equity.

Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The unappropriated lands of that state have been opened to entry and grant, at a very cheap rate, as this record shows; which

policy has let in the abuse sought to be remedied by the bill. That clouds upon old titles, by the issuance of new patents for the same lands, would be the consequence, was manifest; and that citizens of other states are entitled to come into the courts of the United States, to have the rights secured to them by the statute of 1796 enforced, we can not doubt.

But we apprehend, jurisdiction may be assumed by the federal, equally with the state courts, upon another ground. Kentucky may prescribe any policy for the protection of the agriculture of the country that she may deem wise and proper; she has, in effect, declared, that junior patents, issued for previously granted lands, shall be delivered up and cancelled; with the addition that a release of title shall be executed; and it is the duty of the courts to execute the policy. Where the legislature declares certain instruments illegal and void, as the British annuity act does; or as the gaming acts do; there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature. 10 Ves. 218; 5 *Ibid.* 604; 2 Yerg. 524; 1 Madd. Ch. Pr. 185, and authorities cited.

The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the federal courts. For instance, in Tennessee, the legislature has provided that the courts of equity may divest a title, and vest it in another party to the suit; and that the decree shall operate as a legal conveyance. So in Kentucky, the legislature has declared, that the courts may appoint a commissioner to convey, as the attorney in fact of a litigant party; and that such deed shall pass the title; in both instances, binding infants and *femes covert*, if necessary. The federal courts in the states referred to, have adopted the same practice, for many years, without a doubt

having been entertained of its propriety. It may be said, with truth, that this is a mode of conveyance and of passing title which the states have the exclusive right to regulate; still the same statute that conferred the power thus to decree a conveyance, prescribed the mode of proceeding; and had the form of the remedy been rejected by the courts of the United States, the right to have such record conveyance would have fallen with it, as they could not be separated.

The undoubted truth is, that when investigation and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy; so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery.

The complainant's case being one coming clearly within the rules alluded to, we order that the decree of the court below be reversed and the cause remanded to be proceeded in according to the rights of the parties.

SCOTT v. NEELY.

Reported in 140 U. S. 106.
(1890.)

FIELD, Justice: This is a suit in equity to subject the property of the defendants to the payment of a simple contract debt of one of them, in advance of any proceedings at law, either to establish the validity and amount of the debt, or to enforce its collection, as authorized by the statutes of Mississippi. * * *

At the outset of the case the question is presented, whether a suit of this kind, where the complainant is a simple contract creditor, can be maintained in the courts of the United States. It is sought to uphold the affirmative of this position on the ground that the statute of Mississippi creates a new equitable right in the creditor, which, being capable of assertion by proceedings in conformity with the pleadings and practice in equity, will be enforced in those courts. The case of *Clark v.*

Smith, 13 Pet. 195; *Broderick's Will*, 21 Wall. 503, and *Holland v. Challen*, 110 U. S. 15, are cited in its support.

The general proposition, as to the enforcement in the federal courts of new equitable rights created by the states, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed by the constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the states by whose legislation it is created. The constitution, in its seventh amendment, declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In the federal courts this right can not be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact.

In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the federal courts. Uniting with a demand for its payment, under the statute of Mississippi, a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it.

This conclusion finds support in the prohibition of the law of congress respecting suits in equity. The sixteenth section of the Judiciary Act of 1789 enacted that such suits "shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;" and this prohibition is carried into the Revised Statutes, Section 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated,

a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of congress to pursue his remedy in such cases in a court of equity. *Hipp v. Babin*, 19 How. 271, 278; *Lewis v. Cocks*, 23 Wall. 466, 470; *Killian v. Ebbinghaus*, 110 U. S. 568, 573; *Buzard v. Houston*, 119 U. S. 347, 351. All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States. * * *

The Code of Mississippi gives to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property. There the whole suit, involving the determination of the validity of the contract, and the amount due thereon, is treated as one in equity, to be heard and disposed of without a trial by jury. It is not for us to express any opinion of the wisdom of this law, or whether or not in its operation it is more advantageous in the interest of justice than an entire separation of proceedings at law from those for equitable relief. It is sufficient that under the statute of the United States such separation is required in the federal courts, and by the constitution, in cases at common law, a right to a trial by jury is secured to the defendant. * * *

Upon the contention of the complainants it is not perceived why all actions at law, even for injuries to persons or property, may not be withdrawn by the state from a court of law to a court of equity, by allowing a lien upon the property of the defendants on the issue of process at the commencement

of the action, and authorizing the court to direct a sale of the whole or a portion thereof, in its discretion, to pay the damages recovered, and to set aside any obstacles to their satisfaction from fraudulent conveyances of the wrong-doer. Whatever control the state may exercise over proceedings in its own courts such a union of legal and equitable relief in the same action is not allowed in the practice of the federal courts. * * *

It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief. Its decree must therefore be reversed, and the cause remanded with directions to dismiss the bill, without prejudice to an action at law for the demand claimed, and it is so ordered.

This case affirmed and applied in *Cates v. Allen*, 149 U. S. 451.

A mechanics' lien enforceable in a state court either at law or in equity will be enforced in equity in a federal court. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579.

HOLLAND v. CHALLEN.

Reported in 110 U. S. 15.
(1883.)

MR. JUSTICE FIELD delivered the opinion of the court: This is a suit in equity to quiet the title of the plaintiff to certain real property in Nebraska as against the claim of the defendant to an adverse estate in the premises. It is founded upon a statute of that state which provides:

“That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the title to such real estate.”

The bill alleges that the plaintiff is the owner in fee simple and entitled to the possession of the real property described. It then sets forth the origin of his title, particularly specifying the deeds by which it was obtained, and alleges that the defendant claims an adverse estate or interest in the premises: that the claim so affects his title as to render a sale or other disposition of the property impossible, and that it disturbs

him in his right of possession. It therefore prays that the defendant may be required to show the nature of the adverse estate or interest claimed by her; that the title of the plaintiff may be adjudged valid and quieted as against her and parties claiming under her, and his right of possession be thereby assured; and that the defendant may be decreed to have no estate in the premises and "be enjoined from in any manner injuring or hindering" the plaintiff in his title and possession.

The defendant demurred to the bill, on the ground that the plaintiff had not made or stated such a case as entitled him to the discovery or relief prayed. The court below sustained the demurrer and dismissed the bill. From this decree the case is brought here on appeal.

It does not appear from the record in what particulars it was contended in the court below that the bill is defective, that is, in what respect it fails to show a right to the relief prayed. We infer, however, from the briefs of counsel, that the same positions now urged in support of the decree were then urged against the bill, that is, that the title of the plaintiff to the property has not been by prior proceedings judicially adjudged to be valid, and that he is not in possession of the property—the contention of the defendant being, that when either of these conditions exists, a court of equity will not interpose its authority to remove a cloud upon the title of the plaintiff and determine his right to the possession of the property.

The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie.

A bill of peace against an individual reiterating an unsuccessful claim to real property would formerly lie only

where the plaintiff was in possession and his right had been successfully maintained. The equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. Adams on Equity, 202; Pomeroy's Equity Jurisprudence, 248; *Stark v. Starrs*, 6 Wall. 402; *Curtis v. Sutter*, 15 Cal. 259; *Shepley v. Rangeley*, 2 Ware, 242; *Devonsher v. Nevenham*, 2 Schoales & Lef. 199.

In most of the states in this country, and Nebraska among them, the action of ejectment to recover the possession of real property as existing at common law has been abolished with all its fictions. Actions for the possession of such property are now not essentially different in form from actions for other property. It is no longer necessary to allege what is not true in fact and not essential to be proved. The names of the real contestants must appear as parties to the action, and it is generally sufficient for the plaintiff to allege the possession or seizin by him of the premises in controversy, or of some estate therein, on some designated day, the subsequent entry of the defendant, and his withholding of the premises from

the plaintiff; and although the plaintiff may in such cases recover, when a present right of possession is established, though the ownership be in another, yet such right may involve, and generally does involve, a consideration of the actual ownership of the property; and in such cases the judgment is as much a bar to future litigation between the parties with respect to the title as a judgment in other actions is a bar to future litigation upon the subjects determined. Where this new form of action is adopted, and this rule as to the effect of a judgment therein obtains, there can be no necessity of repeated adjudications at law upon the right of the plaintiff as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property.

A bill *quia timet*, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. Story's Equity, 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long-continued possession. *Alexander v. Pendleton*, 8 Cranch, 462; *Peirsoll v. Elliott*, 6 Pet. 95; *Orton v. Smith*. 18 How. 263.

The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title. It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily

affecting its use and enjoyment, should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several states, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the states should not be enforced by the federal courts, when the controversy to which it may give rise is between citizens of different states.

In *Clark v. Smith*, 13 Pet. 195, a doctrine is declared, with reference to the legislation of Kentucky as to the removal of clouds upon titles to land, which seems to us to be applicable here, and to be decisive of this point. * * *

No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the

possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity.

It does not follow that by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking. Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will properly rest with the court. Such, also, will generally be the case with the adverse estates or interests claimed by others. This was the character of the proofs establishing the title of the complainant in *Clark v. Smith*, already cited. But should proofs of a different character be produced, the controversy would still be one upon which a court of law could not act. It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved.

In the present case the plaintiff claims under a purchaser at a tax sale by the state, to whom deeds by the treasurer of the county in which the property is situated were executed. By the law of Nebraska the fee of real property, and not merely a term of years, may be sold for unpaid taxes. A certain time is allowed to the owner to redeem the property from such a sale, but if redemption is not made within the period designated, a deed is executed by the treasurer of the county to the purchaser, and such deed vests in him the right,

title, and estate of the former owner of the land and also of the state and county, and is evidence in all courts that the property conveyed was subject to the taxes for the years stated; that they were not paid, and that redemption was not made before the sale; that the property had been properly listed and assessed and the taxes properly levied; that the property was advertised for sale in the manner and for the length of time required, and was sold as stated in the deed, and that the grantee named was the purchaser or assignee of the purchaser of the property; and, indeed, that all the prerequisites of the law had been complied with by the officers whose duty it was to have taken any part in the transaction relating to or affecting the title conveyed. No person is permitted to question the title thus acquired without showing that he had title to the property at the time of the sale, or has since obtained the title from the United States, and that the property was not subject to taxation for the years named; or that the taxes had been paid before the sale, or that the property had never been assessed for taxation, or had been redeemed from the sale, or that there had been fraud committed by the officer in making the sale, or by the purchaser to defeat it.

The plaintiff, therefore, had a complete legal title to the premises in controversy, unless some one of the defects mentioned, affecting the validity of the assessment and sale of the property, existed at the time, or fraud had been committed by the officer or purchaser in the sale. Having an apparent legal title by the deeds, it was, of course, important to him and, indeed, necessary for the peaceable possession of the property and its improvements, to have any adverse claims, notwithstanding such deeds, considered and settled.

We think, therefore, that he was entitled, upon the statement made in his amended bill, the only one before us, to call upon the defendant to produce and disclose whatever estate she had in the premises in question, to the end that its validity may be determined; and if adjudged invalid, that the title of the plaintiff may be quieted. It follows that the decree of the court below must be reversed and the cause

remanded, with leave to the defendant to answer the bill, and *it is so ordered.*

This case is explained and distinguished in *Whitehead v. Shattuck*, 138 U. S. 146.

BENNETT v. BUTTERWORTH.

Reported in 11 Howard, 669.

(1850.)

MR. CHIEF JUSTICE TANEY delivered the opinion of the court: This is a writ of error to the district court of the United States for the district of Texas.¹

The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity.

Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in the state courts have been adopted in the district court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court.

But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the Act of August 23, 1842), regulating proceedings in equity in the courts of the United States.

There is nothing in these proceedings which resembles a bill or answer in equity according to the rules prescribed by

this court, nor any evidence stated upon which a decree in equity could be revised in an appellate court. Nor was any equitable title set up by Butterworth, the plaintiff, in the court below. He claimed in his petition a legal title to the negroes, which the defendant denied, insisting that he himself was the legal owner. It was a suit at law to try a legal title. * * *

¹ The action below was by petition in the nature of a bill in equity for the specific delivery of the slaves.

MISSISSIPPI MILLS v. COHN.

Reported in 150 U. S. 202.

(1893.)

THE facts in this case are as follows: On March 29, 1881, Joel Wood and William H. Lee, citizens of the state of Missouri, partners as Wood & Lee, obtained a judgment in the eighth district court of the parish of East Carroll, Louisiana, against Simon Cohn, a citizen of the state of Louisiana, for \$539.25, with interest, for goods sold by them to him on October 30, 1880. On April 2, 1881, S. B. Newman and S. D. Stockman, composing the firm of S. B. Newman & Co., also obtained a judgment in the same court against said Cohn for \$24,282.16, which judgment, subject to a credit of \$5.452, the proceeds of certain attachment proceedings accompanying the action, was duly assigned to Wood & Lee. Newman and Stockman were both citizens of Louisiana. On November 30, 1885, Wood & Lee filed their bill in equity in the circuit court of the United States for the western district of Louisiana against Simon Cohn, his wife Fannie Cohn, and his wife's mother, Henrietta Steinhardt, all citizens of Louisiana, the purpose and object of which was to set aside as fraudulent a judgment in favor of Mrs. Cohn against Simon Cohn, and to subject certain property standing in the name of Mrs. Steinhardt, and alleged to be the property in fact of Simon Cohn, to the payment of these judgments. On July 11, 1882, the Mississippi Mills, a corporation organized under the laws of the state of Mississippi, obtained a judgment in the eighth district court of the parish of East Carroll, Louisiana, against Simon Cohn, for \$751.46. On July 5, 1883, it commenced in that court a suit of substantially the same nature

as that commenced by Wood & Lee; this suit was duly removed to the circuit court of the United States for the western district of Louisiana. After such removal, and on October 29, 1886, these cases were consolidated by an order of the circuit court, and from that time on they proceeded as one case. Pleadings having been perfected and proofs taken, the consolidated case was submitted to the circuit court, and on July 18, 1889, a decree was entered dismissing the bills of plaintiffs for want of jurisdiction. To reverse this decree of dismissal, appellants have brought their appeal to this court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court: No appearance has been made for the appellees in this court, and we should be at a loss to know the grounds for the decision of the circuit court were it not for the opinion of District Judge Boorman, before whom the case was heard, 39 Fed. Rep. 865, which gives his reasons for entering the decree of dismissal.

It may be premised that no objection arises on account of the amount in controversy in either suit, for at the time these suits were brought the circuit court had jurisdiction where such amounts exceeded the sum of five hundred dollars. Rev. Stat. 629. Nor can there be any doubt of the jurisdiction of this court over the appeal of either appellant, treating them as separately appealing, because the case in the trial court involved the question of the jurisdiction of that court. 25 Stat. 693, Act of February 25, 1889, c. 236. The decision of the circuit court was to the effect that no relief could be had in equity, because under the practice prescribed in that state there was a remedy by an action at law. We quote from the opinion:

“If it be true that Cohn, notwithstanding said purchases, transfers, etc., were ostensibly made by Mrs. Steinhardt, and the title of record is in her name, is the real owner of the property now sought to be subjected to the payment of Cohn’s debts, the complainants have a well-known and adequate remedy at law to make the property liable for their claims.

“The issues made up by the pleadings and evidence involve fundamentally the title to, or the real ownership of, the

property in question. The complainants charge that Cohn, in fact and law, is the owner thereof. The defendants deny his ownership, and contend that the sales were real sales to Mrs. Steinhardt. Such issues are not determinable in this court in equity proceedings. * * * In the view and purpose of complainant's charges, Cohn now owns the property, and they have not presented or sought to present such an action as should be heard in equity, and it is ordered that their suit be dismissed."

We are unable to concur in these views. It is well-settled that the jurisdiction of the federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished; though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the federal court, sitting as a court of equity, remains unchanged. Thus, in *Payne v. Hook*, 7 Wall. 425, 430, it was said, citing several cases: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states can not be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses: is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union." And in *McConihay v. Wright*, 121 U. S. 201, 205: "The contention of the appellants, however, is that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made, in support of this contention, to the West Virginia Code of 1868, Ch. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in land, though not in possession. Admitting this to be so, it nevertheless, can not have the effect to oust the jurisdiction in equity of the courts of

the United States as previously established. That jurisdiction as has often been decided, is vested as a part of the judicial power of the United States in its courts by the constitution and acts of congress in execution thereof. Without the assent of congress that jurisdiction can not be impaired or diminished by the statutes of the several states regulating the practice of their own courts." See also *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451, in which a state statute, extending the jurisdiction of equity to matters of a strictly legal nature, was held inapplicable to the federal courts, and unavailing to vest a like jurisdiction in such courts, sitting as courts of equity.

So, conceding it to be true, as stated by the learned judge, that the full relief sought in this suit could be obtained in the state courts in an action at law, it does not follow that the federal courts, sitting as a court of equity, is without jurisdiction. The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give. * * *

Decree dismissing for want of jurisdiction was reversed.

THOMPSON v. RAILROAD COMPANIES.

Reported in 6 Wallace, 134.
(1867.)

APPEAL from the circuit court for the southern district of Ohio.

The case was this: The Code of Civil Procedure of Ohio provides that every action must be prosecuted "in the name of the real party in interest," etc.; and "that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

With this provision of the code in force, the Central Ohio and another railroad company agreed to transport over their road, for one Thompson, a quantity of horses and mules,

stipulating for payment in a certain mode, to which Thompson assented. In conformity with this agreement (the service having been performed) drafts were drawn on Thompson, which he neglected or refused to pay. These drafts, for convenience of collection, were drawn payable to the order of a certain D. Robinson, cashier, Robinson having, however, no interest in the proceeds. To enforce the collection, what is termed as above mentioned, by the code in Ohio, a civil action, was instituted in one of the courts of the state, against Thompson, in the name of the railroad companies. The petition (used in lieu of a declaration) stated the original indebtedness from Thompson for freight, the giving of the drafts, their protest for non-acceptance or non-payment, and after averring that the plaintiffs were compelled to take them up, asked for judgment against the defendant for principal and interest. Thompson being a citizen of Kentucky removed the cause to the federal court. When it reached there, by leave of the court, a bill in equity (setting up the same cause of action) was substituted for the petition originally filed in the state court, and the suit went on as a cause in chancery. The circuit court rendered a decree in favor of the complainants for the amount of the drafts, with interest. From this decree the defendants appealed, assigning as the chief ground of error that the complainants had a plain and adequate remedy at law, which they had in fact pursued in the state court, and which they ought to have followed out in the federal court.

MR. JUSTICE DAVIS delivered the opinion of the court: Has a court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the court below must be reversed, the bill dismissed, and the parties remitted to the court below to litigate their controversies in a court of law. Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, but if a plain defect of jurisdiction appears at the hearing, or on appeal, a court of equity will not make a decree.

The constitution of the United States and the act of congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States

are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.

This case does not present a single element for equitable jurisdiction and relief.

The suit brought in the state court was nothing but an ordinary action at law. When it was removed to the federal courts a bill in equity (alleging the same cause of complaint) was substituted, by leave of the court, for the petition originally filed in the state court, and the suit progressed as a cause in chancery. Thus, an action at law, which sought solely to recover damages for a breach of contract, was transmuted into a suit in equity, and the defendant deprived of the constitutional privilege of trial by jury. The absence of a plain and adequate remedy at law, is the only test of equity jurisdiction, and it is manifest that a resort to a court of chancery was not necessary, in order to enable the railroad companies to collect their debt.

Whether their proper course was to sue upon the contract, or upon the drafts, or upon both together, the remedy at law was complete.

If the remedy at law was adequate in the state court, why the necessity of going into a court of equity, when the jurisdiction was transferred to a federal tribunal? The reason given is, because in Ohio the real parties in interest must bring the suit, and as the nominal legal title in the drafts was in the payee, Robinson, the railroad companies (after the transfer) could not proceed at law, and continue plaintiffs on the record, and were, therefore, obliged to change the case from an action at law into a suit in equity. If this position were sound, it would allow a federal court of equity to entertain a purely legal action, transferred from the state court, on the mere

ground, if it were not done, the plaintiff would have to commence a new proceeding. It surely does not need argument or authority to show, that the jurisdiction of a federal court is not to be determined by any such consideration.

But there was no necessity for a change from law to equity after the suit was transferred.

The railroad companies mistook the course of proceeding in courts of the United States in action at law, in suits brought up from state courts. In this case, as the action was a purely legal one, if they could have maintained it in their names in the state court, they had an equal right to maintain it in their names when it arrived in the federal court.

In actions at law the courts of the United States may proceed according to the forms of practice in the state courts, and in such actions they administer the rules of evidence as they find them administered in the state courts. There was, therefore, no difficulty whatever in the plaintiffs in the state court remaining plaintiffs on the record, and prosecuting their suit in the same manner they were authorized to prosecute it by the laws of the state. If, in Ohio, the drafts could have been received in evidence in a state court, in a suit brought by the railroad companies against Thompson, then, on the transfer of the suit to the federal court, and trial had there, they would have been equally receivable in evidence. The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the state court, in conformity with it; and in all cases transferred from the state to the federal court, under the twelfth section of the Judiciary Act, this title will be recognized and preserved; and when a declaration is required by the rules of the circuit court, it may be filed in the name of the party who was the plaintiff in the state court.

For various applications of the principle of separation of law and equity, see *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Alger v. Anderson*, 92 Fed. 696; *Mutual Life Ins. Co. v. Pearson*, 114 Fed. 395; *Brun v. Mann*, 151 Fed. 145; *Brissell v. Knapp*, 155 Fed. 809; *Lawson v. Mining Co.*, 207 U. S. 1; *Preston v. Sturgis Co.*, 183 Fed. 1; *Lehman v. Island City Co.*, 208 Fed. 1014; *Darragh v. H. Wetter Mfg. Co.*, 78 Fed. 7.

That federal courts will enforce rights growing out of state laws and *vice versa*, see, In *Ex parte McNiel*, 13 Wall. 236, at p. 243, the court

(Justice Swayne) says: "It is urged, further, that a state law could not give jurisdiction to the district court. That is true. A state law can not give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties the right may be enforced in the proper federal tribunal whether it be a court of equity, of admiralty or of common law.

"The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction." And *Wilson v. Perrin*, 11 C. C. A. 66, and *Hill v. Hite*, 29 C. C. A. 549 (note), and see *Second Employer's Liability Cases*, 223 U. S. 1, at pp. 55 to 59.

6. COMMON LAW OF UNITED STATES.

UNITED STATES v. HUDSON.

Reported in 7 Cranch, 32.

(1812.)

THIS was a case certified from the circuit court for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the president and congress of the United States, contained in the *Connecticut Courant*, of the 7th of May, 1806, charging them with having in secret voted \$2,000,000 as a present to Bonaparte, for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the circuit court of the United States had a common law jurisdiction in cases of libel?

Pinkney, attorney general, in behalf of the United States and Dana, for the defendants, declined arguing the case.

The court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, J.: The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in

criminal cases. We state it broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now, for the first time, to be decided by this court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to the conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose; and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power can not deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire, whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough, that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation. And such is the opinion of the majority of this court; for the power which congress possesses to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended, in its nature very indefinite, applicable to a great variety of

subjects, varying in every state in the Union and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district.

The only ground on which it has ever been contended that this jurisdiction could be maintained is that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked, that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it, which is here contended for. If it may communicate certain implied powers to the general government, it would not follow, that the courts of that government are vested with jurisdiction over any particular act done by an individual, in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases, we are of opinion, is not within their implied powers.

See, accord, *United States v. Coolidge*, 1 Wh. 415; *United States v. Hall*, 98 U. S. 343, 345; *United States v. Eaton*, 144 U. S. 677, 687; *United States v. Martin*, 176 Fed. 110, 112; *Manchester v. Massachusetts*, 139 U. S. 240, 262.

WHEATON v. PETERS.

Reported in 8 Peters, 591, 657 to 659.

(1834.)

M'LEAN, J.: * * * That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, can not be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labor as any other member of society, can not be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.

The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be

founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted, but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country?

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania, for the first volume of the book in controversy, and it was published in that state; we may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania.

It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.

That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this Union. It was adopted, so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions,

the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each. * * *

SMITH v. ALABAMA.

Reported in 124 U. S. 465, 478.

(1887.)

MATTHEWS, J.: * * * There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, where the common law, prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state.

In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state court than in other cases. *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Providence Washington Insurance Co.*, 16 Pet. 495; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14.

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the

English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.

Federal courts are not bound to observance of rules of general commercial law as enforced by the states, see: NEGOTIABLE INSTRUMENTS—*Swift v. Tyson*, 16 Pet. 1; *Watson v. Tarpley*, 18 How. 517; *Oates v. Bank*, 100 U. S. 239; *Railroad v. Bank*, 102 U. S. 14. INSURANCE POLICY—*Carpenter v. Insurance Co.*, 16 Pet. 495. FELLOW SERVANT RULE—*B. & O. Ry. v. Baugh*, 149 U. S. 368.

That the court of claims is governed in matter of rules of evidence by the common law, see *Moore v. United States*, 91 U. S. 270.

MURRAY v. C. & N. W. RY.

Reported in 62 Federal, 24.
(1894.)

THIS was an action by Murray against the Chicago & Northwestern Railway Company to recover damages for alleged unreasonable rates charged for transportation of freight. Submitted on motion and demurrer to amended petition.

SHIRAS, District Judge: * * * The principal point made in the demurrer is that the petition on its face shows that the shipments made from Belle Plaine, Iowa, to Chicago, Ill., were in the nature of interstate commerce, the regulation of which is reserved to congress, exclusively, by Section 8, Article I, of the constitution of the United States, and that, at the dates of the several shipments in the petition described, there was no act of congress or other law regulating commerce between the several states. If I understand correctly the position of the defendant company, it is that, as this action was commenced in the state court, this court, upon removal, succeeds only to the jurisdiction which the state court might have exercised rightfully in case no removal had been had; that in the state court the action could not be maintained for two reasons; First, that as Section 8, Article I, of the constitution of the United States confers the right to regulate interstate commerce exclusively upon congress, thereby depriving

the states of the power to legislate touching the same, it follows that state courts are deprived of all jurisdiction over cases growing out of interstate commerce; and second, that there is no common law of the United States; that the common law of England has become the common law of the several states, in such sense that each state has its own common law; and that the common law of the state of Iowa can not be applied to interstate commerce, in view of the provisions, already cited, of the constitution of the United States. Dealing with these propositions in the reverse order of their statement, is it true that the principles of the common law are not in force in the United States with respect to such subjects as are placed within the exclusive control of congress? It will not be questioned that, before the Revolution, the common law was in force, so far as applicable, in the several colonies then existing. * * * (The court refers to and quotes from numerous cases in the United States supreme court in which the question was considered, and continues:)

Citations of this character from the decisions of the supreme court might be continued almost without limit. From them it appears, beyond question, that the constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they can not be interpreted in the light of the common law. When the constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the constitution was erected. The problem sought to be solved was not whether the constitution should create or enact a law of nations, of admiralty, of equity or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between

the national and state governments. The principles, duties, and obligations inhering in these systems of law were already in force. The constitution neither created nor adopted them, but recognizing the fact that they were in fact in existence, and were the possessions of the people, it proceeded to apportion the exercise thereof between the national and state governments. The general line of division, as already said, is based upon the principle of national control over subjects affecting the country and the people as a whole, and wherein uniformity of rule and control is desirable, if not indispensable, and of state control over subjects of local interest. The result was that upon the national government was conferred, as to some subjects, paramount and exclusive control; as to others, paramount, but not exclusive, control, unless congress by legislation excluded state action; as to others, control concurrent with the states. The division thus made is as to the subjects of legislative and judicial jurisdiction, and not a division of systems of law. The constitution does not place under national control the law of nations and of admiralty, and under state control common law and equity, but it divides the subjects of governmental control, and each subject carries with it the law or system appropriate thereto. The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations and the right to seek changes in this law by conventions with other governments are committed to the national government. The right to regulate foreign commerce is conferred exclusively upon congress, and of necessity that confers upon the national legislature and judiciary the duty of enforcing the law maritime. The right to regulate interstate commerce is conferred exclusively upon congress, and, when it legislates, the resulting statute will be interpreted with reference to the general principles of the common law. In the absence of congressional regulation of interstate commerce, the courts called upon to decide cases arising out of interstate commerce must apply the principles of the common law. So, also, when called upon to decide cases arising out of intrastate commerce, when there is no state statute or law applicable thereto, the courts must apply the common law. The

apportionment of control over foreign, inter- and intrastate commerce, made by the constitution, did not affect the applicability of the common law thereto. It divided the control over the general subject of commerce, and apportioned to the national government exclusive legislative control over foreign and interstate commerce; and this apportionment carried with it the right to confer upon the national judiciary jurisdiction over cases involving foreign and interstate commerce, and, in the exercise of this jurisdiction, the courts are bound by the general principles of the common law, save where the same have been changed by legislative enactment. * * *

The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the constitution, there was in existence a common law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the constitution did not deprive the people who formed the constitution of the benefits of the common law; that, as to such matters as were by the constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the constitution and congress, acting in furtherance of its provisions, have created the supreme court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States (the supreme court being the final arbiter) have the right

to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime. The transactions out of which the present controversy arises pertain to interstate commerce. The defendant company, when engaged in transporting the grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act.

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the state can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several states do not necessarily apply to the judicial branches of the national and state governments. The legislature of a state can

not abrogate or modify any of the provisions of the federal constitution nor of the acts of congress touching matters within congressional control, but the courts of the state, in the absence of a prohibitory provision in the federal constitution or acts of congress, have full jurisdiction over cases arising under the constitution and laws of the United States. The courts of the states are constantly called upon to hear and decide cases arising under the federal constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the state, when the adverse parties are citizens of different states. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a state can not abrogate or change it, but the courts of the state may apply and enforce it; ¹ and hence the fact that a given subject, like interstate commerce, is beyond state legislative control, does not, *ipso facto*, prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.^{2 3}

¹ See *Second Employer's Liability Cases*, 223 U. S. 1, pp. 55 to 59.

² Affirmed in 92 Fed. 868.

³ In *W. U. Tel. Co. v. Call*, 181 U. S. 92 (1900), it is said: "There is no body of federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress.

"What is the common law? According to Kent: 'The common law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of

the legislature.' 1 Kent, 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common, law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.' 1 Blackstone, 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

"Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of congress? We are clearly of opinion that this can not be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment."

7. RELATION OF FEDERAL AND STATE JUDICIARY.

THE FEDERALIST No. 82.

Edited by Lodge, p. 512

(1788.)

THE principles established in a former paper teach us that the state will retain all pre-existing authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the states: or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this

impression, I shall lay it down as a rule, that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts, is contained in this passage: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress shall from time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one supreme court, and as many subordinate courts as congress should think proper to appoint; or in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals; and as the first would amount to an alienation of state power by implication, the last appears to me the most natural and the most defensible construction.

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be peculiar to, the constitution to be established; for not to allow the state courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legisla-

ture, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Here another question occurs: What relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as *one whole*. The courts of the latter will of course, be natural auxiliaries

to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to the supreme court to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the state courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the supreme court." It declares, in the next place, that "the *judicial power* of the United States shall be vested in one supreme court, and in such inferior courts as congress shall ordain and establish;" and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them, are that they shall be "inferior to the supreme court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals, in most

cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts to district courts of the Union. *Publius*.

CLAFLIN v. HOUSEMAN.

Reported in 93 U. S. 130.
(1876.)

ERROR to the supreme court of the state of New York. This action was brought in May, 1872, in the New York supreme court, county of Kings, by Julius Houseman, as assignee in bankruptcy of Comstock and Young, against Horace B. Claflin, under the thirty-fifth section of the Bankrupt Act, to recover the sum of \$1,935.57 with interest, being the amount collected by Claflin on a judgment against the bankrupts, recovered within four months before the commencement of proceedings in bankruptcy. The ground of the action, as stated in the complaint, was that they (the bankrupts) suffered the judgment to be taken by default, with intent to give Claflin a preference over their other creditors, at a time when they were insolvent, and when he knew, or had reasonable cause to believe, that they were insolvent, and that the judgment was obtained in fraud of the bankrupt law. The defendant demurred to the complaint, assigning as cause, first, that the court had no jurisdiction of the subject of the action: secondly, that the complaint did not state facts sufficient to constitute a cause of action. Judgment was rendered for the plaintiff on the thirteenth day of January, 1873, and was subsequently affirmed both by the general term of the supreme court and by the court of appeals. This judgment is brought here by writ of error, under the second section of the Act of Feb. 5, 1867 (14 Stat. 385).

MR. JUSTICE BRADLEY delivered the opinion of the court: The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy can not sue in the state courts.

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, sometimes with a leaning in one direction

and sometimes in the other, but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provisions, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws, may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 429, and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws

is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.

A reference to some of the discussions, to which the subject under consideration has given rise, may not be out of place on this occasion. * * *

These views seem to have been shared by the first congress in drawing up the Judiciary Act of Sept. 24, 1789; for in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the state courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history that the state courts retained their usual jurisdiction concurrently with the federal courts invested with jurisdiction in like cases.

Thus, by the Judiciary Act, exclusive cognizance was given to the circuit and district courts of the United States of all crimes and offenses cognizable under the authority of the

United States; and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction, of all seizures on water under the laws of impost, navigation, or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. Concurrent jurisdiction with the state courts was given to the district and circuit courts of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States, and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is between a citizen of the state where an alien is a party, etc. Here, no distinction is made between those branches of jurisdiction in respect to which the constitution uses the expression "all cases," and those in respect to which the term "all" is omitted. Some have supposed that wherever the constitution declares that the judicial power shall extend to "all cases"—as, all cases in law and equity arising under the constitution, laws, and treaties of the United States; all cases affecting ambassadors, etc.—the jurisdiction of the federal courts is necessarily exclusive; but that where the power is simply extended "to controversies" of a certain class—as, "controversies to which the United States is a party," etc.—the jurisdiction of the federal courts is not necessarily exclusive. But no such distinction seems to have been recognized by congress as already seen in the Judiciary Act; and subsequent acts show the same thing. Thus, the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the circuit court of the United States, "or any other court having competent jurisdiction"—meaning, of course, the state courts.

The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the circuit courts as to imply that it was exclusive of the state courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870. and Rev. Stat. U. S., section 711; *Parsons v. Barnard*, 7 Johns, 144; *Dudley v. Mayhew*, 3 Comst. 14; *Elmer v. Pennell*, 40 Me. 434.

So with regard to naturalization—a subject necessarily within the exclusive regulation of congress—the first act on the subject, passed in 1790, and all the subsequent acts, give plenary jurisdiction to the state courts. The language of the Act of 1790 is, “any common law court of record in any one of the states,” etc., 1 Stat. 103. The Act of 1802 designates “the supreme, superior, district, or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States.” 2 Stat. 153.

So, by Acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties, and forfeitures under the revenue laws of the United States. 2 Stat. 354, 489. And by Act of March 3, 1815, cognizance was given to state and county courts, generally, of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat. 244.

These instances show the prevalent opinion which existed, that the state courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the state courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See *United States v. Lathrop*, 17 Johns, 4. See, especially, the able dissenting opinion of Mr. Justice Platt, *Id.* 11.¹

It was, indeed, intimated by Mr. Justice Story, *obiter dictum*, in delivering the opinion of the court in *Martin v. Hunter's Lessee*, 1 Wheat. 334-337, that the state courts could not take direct cognizance of cases arising under the constitution, laws, and treaties of the United States, as no such jurisdiction existed before the constitution was adopted. This is true as to jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent) under the authority of the states. Inventors had grants of exclusive right to their inventions before the constitution was adopted

and the state courts had jurisdiction thereof. The change of authority creating the right did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. *Houston v. Moore*, decided in 1820, 5 Wheat. 1, was such a case. Congress, in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine, to be determined and adjudged by a court-martial, without specifying what court-martial. The legislature of Pennsylvania also passed a militia law, providing for the organization, training, and calling out the militia, and establishing courts-martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and as far as it covered the same ground, was for that reason held to be inoperative and void. Houston, a delinquent under the United States law, was tried by a state court-martial; and it was decided that the court had jurisdiction of the offense, having been constituted, in fact, to enforce the laws of the United States which the state legislature had re-enacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the state court had jurisdiction of the offense, irrespective of the authority, state or federal, which created it. Not that congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. Justices Story and Johnson dissented; and, perhaps, the court went further, in that case, than it would now. The act of congress having instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction; and the court conceded that congress had the power to make the jurisdiction of its own courts exclusive.

In *Cohens v. Virginia*, 5 Wheat. 415, Chief Justice Marshall demonstrates the necessity of an appellate power in the federal judiciary to revise the decisions of state courts in cases arising under the constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says, "The propriety of intrusting the construction of the constitution and laws, made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, and if a case of this description brought in a state court can not be removed before judgment, nor revised after judgment, then the construction of the constitution, laws and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted."

See the subject further discussed in 1 Kent's Com. 395, etc.; Sergeant on the Const. 268; 2 Story on the Const., section 1748, etc.; 1 Curtis's Com., sections 119, 134, etc.

The case of *Teal v. Felton* was a suit brought in the state court of New York against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the supreme court and court of appeals of New York, and their decision was affirmed by this court. 1 Comst. 537; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

Without discussing the subject further, it is sufficient to say, that we hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the state courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case. *Judgment affirmed.*

Insurance Co. v. Morse, 20 Wall. 445 (see below at p. 76); *Ableman v. Booth*, 24 How. 506 (see below at p. 80); *Plaque-mines Fruit Co. v. Henderson*, 170 U. S. 511 (see below at p. 96).

¹ See *Hoxie v. Ry.*, 82 Conn. 352, and *Mondon v. Ry.*, 82 Conn. 373; and reversing the latter, see *Second Employer's Liability Cases*, 223 U. S. 1, at pp. 55 to 59; following *Clafin v. Houseman*, 93 U. S. 130.

a. Mutual recognition of jurisdiction.

DIGGS v. WOLCOTT.

Reported in 4 Cranch, 179.

(1807.)

THIS was an appeal from a decree of the circuit court for the district of Connecticut, in a suit in chancery.

The appellants, Diggs & Keith, had commenced a suit at law against Alexander Wolcott, the appellee, in the county court for the county of Middlesex, in the state of Connecticut, upon two promissory notes given by Wolcott to one Richard Matthews, for the purchase of lands in Virginia, and by him indorsed to the appellants; whereupon, Wolcott filed a bill in chancery in the superior court of the state, against the appellants, Diggs & Keith, and also against Robert Young and Richard Matthews, praying that Diggs & Keith might be compelled to give up the two notes to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof, etc.

This suit in chancery was removed by the appellants from the state court into the circuit court of the United States for the district of Connecticut, where it was decreed that Diggs & Keith should, on or before a certain day, deliver the notes to the clerk of the court, and in default thereof should forfeit and pay to Wolcott \$1,500; and that they should be perpetually enjoined, etc.; and that Robert Young should repay to the appellee the amount of principal and interest which the latter had paid on account of the purchase of the lands; and that the appellee should deliver up to the clerk the surveys of the lands; and the bond of conveyance; and in default thereof should pay to R. Young the sum of \$20,000.

The case was argued upon its merits by C. Lee and Swann, for the appellants, and by P. C. Key, for the appellee; but

the court being of opinion, that a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court, *reversed the decree.*

Accord. *Peck v. Jenness*, 7 How. 612.

McKIM v. VOORHIES.

Reported in 7 Cranch, 279.
(1812.)

THIS was a case certified from the circuit court for the district of Kentucky, in which the opinions of the judges were opposed.

At the July adjourned term of the court below, in the year 1808, McKim, a citizen of Maryland, recovered a judgment in ejectment against Voorhies, a citizen of Kentucky, for the undivided third part of a water mill, with its appurtenances, in the county of Franklin, in the state of Kentucky. At the same time, Voorhies filed his bill in chancery, in the court below, against McKim and John Instone, a citizen of Kentucky, and Hayden Edwards, a citizen of South Carolina, claiming an equitable lien on the said third part of the mill, etc., on account of contracts, etc., between Bennett Pemberton (under whom Voorhies held the premises) and Hayden Edwards and John Instone; Pemberton having sold the said third part of the mill, etc., to Edwards, who sold to Instone, who sold and conveyed to McKim. Instone was the only defendant served with process from the court below. McKim and Instone answered the bill, and brought on a motion to dissolve the injunction on the merits, which was overruled by the court below.

At the term next preceding November term 1810 (Edwards not having answered), the court below dismissed the suit as to him; and as to Instone, for want of jurisdiction; after which, Voorhies had leave to discontinue as to McKim, on payment of costs. The suit was accordingly discontinued. Previous to this disposition of the cause, Voorhies filed his bill in chancery, against the same parties, in the state circuit court for the county of Franklin, in the state of Kentucky, in which he set up the same equity as he charged in his bill in the court below. On this bill he, by an order from one of the circuit judges

of the state, obtained an injunction, staying all further proceedings on the said judgment in ejectment, until the matters of the said bill were heard in equity. This injunction was dissolved, at the July term of the Franklin circuit court; shortly after which, the said injunction was reinstated by the order of the Honorable Caleb Wallace, one of the judges of the court of appeals of the state of Kentucky, issued under the act of the general assembly of that state, passed at their December session, in the year 1807.

The injunction issued in the cause by the state court, and the order reinstating that injunction, were duly notified to the clerk of the court below, and official copies of each lodged in his office. On the third day of the session of the court below, at its November term 1810, McKim, by his attorney, applied to the clerk of the court below for a writ of *habere facias possessionem* on the said judgment in ejectment, but the clerk refused to issue the writ, in consequence of the injunction and orders aforesaid; whereupon, McKim, by his counsel, moved the court below to instruct and order their clerk to issue a writ of *habere facias possessionem*, on the judgment of that court, the injunction and orders aforesaid notwithstanding. Upon this motion of the plaintiff, the opinions of the judges were opposed. The case was submitted by Harper, for the plaintiff, without argument. There was no appearance for the defendant.

March 14, 1812. All the judges being present, Todd, J., stated the opinion of the court to be, that the state court had no jurisdiction to enjoin a judgment of the circuit court of the United States; and that the court below should be ordered to issue the writ of *habere facias*.

That a state legislature can not annul a judgment of a federal court or prevent the execution thereof, see *United States v. Peters*, 5 Cr. 115.

RIGGS v. JOHNSON COUNTY.

Reported in 6 Wallace, 166.

(1867.)

THE court refers to a statute of Iowa concerning the issue of bonds by a county and decisions of the state courts as to the validity of such bonds, and proceeds on page 167:

While the state decisions, that the county could issue such bonds, were yet unreversed, the commissioners of Johnson county issued, in a negotiable form, a large number of coupon bonds, payable to bearer. The bonds recited on their face that they were issued under authority of the act of assembly, and of the required vote, etc., and (as the fact was) that they had been issued by the county for stock in a railroad company specified.

Marcus Riggs having become the holder of several of them, brought suit and obtained judgment in the circuit court of the United States for Iowa; but execution being issued, it was returned *nulla bona*. There was nothing which by the laws of Iowa where statutes exempt public property of a county and the property of the private citizens from being levied on to pay debts of a civil corporation—could be found to satisfy the execution. After this, various taxpayers of the county filed a bill in chancery in one of the state courts against the county commissioners (none of the bondholders, however, being made parties to the proceeding or having notice of it), alleging that the bonds and coupons were void from the beginning, and had been repeatedly held so by the supreme court of Iowa, and praying a perpetual injunction to the commission against levying any tax to pay them; which injunction the state court granted. After the injunction upon this proceeding instituted in the state court had been issued, Riggs—by petition reciting his judgment, unsatisfied after execution, and the fact that it was obtained on the bonds such as above described, reciting also the vote of the county to pay the tax, and that it had the effect of a law—applied to the circuit court of the United States for a mandamus to the commissioners to compel them to lay a tax, “sufficient to pay the amount of the said judgment and cost and of the principal and interest falling due for each year on said bonds, and especially the interest warrants or coupons included in the aforesaid judgment, and to continue the same from year to year, until the said bonds and coupons or interest warrants are fully paid, in payment for the coupons or interest warrants annexed to said bonds, now due and unpaid, and not included in the aforesaid judgment, and of such coupons or interest

warrants as they shall become due.” The commissioners answered, making as return the injunction previously laid on them by the state court. Riggs demurred to the answer, assigning four causes of demurrer, the substance of the one chiefly relied on, and considered here, being, that “after the judgment was rendered” in the circuit court, the state court had “no jurisdiction, power or authority” to prevent him “from using the *process* of this court by writ of mandamus to collect his judgment.”

The circuit court overruled the demurrer, and judgment was given for the commissioners. The case was now here on error.

CLIFFORD, J.: * * * VI. Before proceeding to consider the operation and effect of the injunction issued by the state court, it becomes necessary to examine more closely into the sources, nature, and operation of federal process, and the jurisdiction and power of the circuit courts in the several states. Circuit courts were created by the act of congress, under which the judicial system of the United States was organized, but the act made no provision for the forms of process. Forms of processes in the federal courts were regulated by the act of congress, which was passed five days later.

Writs and processes issuing from a circuit court were required by that act to bear the test of the chief justice of the supreme court, to be under the seal of the court, and to be signed by the clerk. By the second section of the act, it was provided that the forms of writs and executions, * * * and the modes of process, in suits at common law * * * should be the same as were then used in the supreme court of the states. Subsequent act adopted substantially those provisions, and made them permanent. Legal effect of those enactments was, that congress adopted the forms of writs and executions, and the modes of process, as then known and understood in the courts of the states, for use in the several circuit courts.

Modes of process, and forms of process, were in use in the states at that period, other than such as were known at common law as understood in the English courts. Radical changes had been made in some of the states, not only in the

forms of *mesne* process, and the rules of pleading, but in the modes of process in enforcing judgment, as was well known to congress when the Judiciary and Process Acts were passed.

Executions, it is admitted, may be issued by the circuit court, but the power of such courts to issue the other writs necessary to the exercise of jurisdiction, is equally clear, with the single restriction that the writ, and the mode of process, must be agreeable to the principles and usages of law. Usages of law, and not of the common law, it will be observed, are the words of the provision, which, doubtless, refers to the principles and usages of law as known and understood in the state courts at the date of that enactment.

Forms of process, *mesne* and final, and the modes of process varied in essential particulars from the principles and usages of the common law, and in many cases they were different in the different states. Intention of congress, in passing the Process Acts, was, that the forms of writs and executions, and the modes of process, and proceedings in common law suits, in the several circuit courts, should be the same as they were at that time in the courts of the respective states. Instead of framing the forms of process, and prescribing the modes of process, congress adopted those already prepared and in use in the respective states, not as state regulations, but as the rules and regulations prescribed by congress for use in the several circuit courts. Adopted as they were, by an act of congress, they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent state legislation. Alterations can only be made by congress, or by the federal courts, acting under the authority of an act of congress.

Practical effect of the course pursued was, that the forms of writs and executions and the modes of process and proceedings were the same, whether the litigation was in the state court or in the circuit court of the United States. These were not always the same in different states nor in different circuits; and in some instances they were widely different in the different states of the same circuit. Those diversities, or many of them, continue to the present time.

Great diversity in the forms of real actions and of indictments were the necessary effect of the system. Different rules of pleading necessarily followed. Modes of process also were different, both in respect to *mesne* and final process. Attachment of personal and real property upon *mesne* process is allowed in one district, while the power to create any such lien in the service of such process is entirely unknown in another district, even in the same circuit. Lands of the debtor were subject to seizure and sale on execution in one district, while in another real property was only subject to seizure and an extent corresponding to a modified *elegit* as at common law. Money judgments in one district became a lien upon the lands of the judgment debtor, while in another the judgment creditor must first seize the lands before he was entitled to any such preference.

Remedies on judgments against municipal corporations partook of the same diversity in the different districts as that appearing in the modes of process to enforce judgments recovered against private persons. Judgment against such a corporation might be enforced in one district by levying the execution, as issued against the corporation, upon the private property, personal or real, of any inhabitant of the municipality, while in another the appropriate remedy, in case the execution against the corporation was returned *nulla bona*, was mandamus to compel the proper officers of the corporation to assess a tax for the payment of the judgment.

Circuit courts, by virtue of those acts of congress, became armed with the same forms of writs and executions, and vested with the authority to employ the same modes of process, as those in use in the state courts. Permanent effect of that wise measure was, that the forms of writs and executions and the modes of process were the same, whether the litigation was in the forums of the state or in the circuit court of the United States.

Remark should be made that those Process Acts in terms apply only to the old states, but the federal courts in the states since admitted into the Union are, in virtue of subsequent enactments governed by regulations substantially similar.

Express provision in the third section of the act of the nineteenth of May, 1828, is that writs of execution, and other final process issued on judgments rendered in the federal courts, *and the proceedings thereupon*, shall be the same in each state as are now used in the courts of such state. * * *

Authority of the circuit courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred can not be controlled either by the process of the state courts or by any act of a state legislature. Such an attempt was made in the early history of federal jurisprudence, but it was wholly unsuccessful. Suit in that case was ejectionment and the verdict was for the plaintiff. Defeated in the circuit court, the defendant went in to the state court and obtained an injunction staying all proceedings. Plaintiff applied for a writ of *habere facias possessionem*, but the judges of the circuit court being opposed in opinion whether the writ ought to issue, the point was certified to this court; and the decision was that the state court had no jurisdiction to enjoin a judgment of the circuit court, and the directions were that the writ of possession should issue. Prior decisions of the court had determined that a circuit court could not enjoin the proceedings in a state court, and any attempt of the kind is forbidden by an act of congress.

Repeated decisions of this court have also determined that state laws, whether general or enacted for the particular case, can not in any manner limit or affect the operation of the process or proceedings in the federal courts.

The constitution itself becomes a mockery, say the court in that case, if the state legislatures may at will annul the judgments of the federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals.

Congress may adopt state laws for such a purpose directly or confide the authority to adopt them to the federal courts, but their whole efficacy when adopted depends upon the enactments of congress, and they are neither controlled or controllable by any state regulation.

State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them "was traced by landmarks and monuments visible to the eye." Appellate relations exist in a class of cases, between the state courts and this court, but there are no such relations between the state courts and the circuit courts.

Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of the state tribunals. Based on that consideration, the settled rule is, that the remedy of a party, whose property is wrongfully attached under process issued from a circuit court, if he wishes to pursue it in a state tribunal, is trespass, and not replevin, as the sheriff can not take the property out of the possession and custody of the marshal. Suppose that to be so, still the defendants insist that the writ was properly refused, because the injunction was issued before the plaintiff's application was presented to the circuit court. Undoubtedly circuit court and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on *mesne* process, or property seized upon execution, and the general rule is, that where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized.

Corresponding decisions have been made in this court, as in the case of *Hagan v. Lucas*, where it was held that the marshal could not seize property previously attached by the sheriff, and held by him or his agent, under valid process from a state court. Rule laid down in the case of *Taylor v. Carryl, et al.*, is to the same effect as understood by a majority of the court.

Argument for the defendants is, that the rule established in those and kindred cases, controls the present controversy, but the court is of a different opinion, for various reasons, in addition to those already mentioned. Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear that the proposition is wholly untenable. Theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ, as applied in such a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a state court can not enjoin the process or proceedings of a circuit court.

Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it can not be contended that a state court can enjoin any such process of a federal court. When issued by a federal court, the writ of mandamus is never a prerogative writ. Outside of this district no circuit court can issue it at all in the exercise of original jurisdiction.

Power of the circuit courts in the several states to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Express determination of this court is, that it can only be issued by those courts in cases where the jurisdiction

already exists, and not where it is to be acquired by means of the writ.

Proposition of the defendants proves too much; for if it be correct, the circuit courts in the several states can not issue the writ in any case. Such a proposition finds no support in the language of the Judiciary Act, or in the decisions of this court. Twice this court has affirmed the ruling of the circuit court in granting the writ in analogous cases, and once or more this court has reversed the ruling of the circuit court in refusing the writ, and remanded the cause, with directions that it should be issued. Learned courts in the states have advanced the same views, and it does not appear that there is any contrariety of decision.

Tested by all these considerations, our conclusion is, that the propositions of the defendants can not be sustained, and that the circuit courts in the several states may issue the writ of mandamus in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law. Where such an exigency arises, they may issue it, but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract.

Next suggestion of the defendants is, that if the writ is issued, and they should obey its commands, they may be exposed to a suit for damages or to attachment for contempt, and imprisonment. No such apprehensions are entertained by the court, as all experience shows that the state courts at all times have readily acquiesced in the judgments of this court in all cases confided to its determination under the constitution and laws of congress. Guided by the experience of the past, our just expectations of the future are that the same just views will prevail. Should it be otherwise, however, the defendants will find the most ample means of protection at hand. Proper course for them to pursue, in case they are sued for damages, is to plead the commands of the writ in bar of the suit, and if their defense is overruled, and judgment

is rendered against them, a writ of error will lie to the judgment, under the twenty-fifth section of the Judiciary Act.

Remedy in case of imprisonment is a very plain one, under the seventh section of the Act of the second of March, 1833, entitled, an act further to provide for the collection of the duties on imports, prisoners in jail or confinement for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, may apply to either of the justices of the supreme, or a judge of any district, court of the United States for the writ of *habeas corpus*, and they are severally authorized to grant it, in addition to the authority otherwise conferred by law.

Under any such circumstances, the wisdom of congress has provided the means of protection to persons sued or imprisoned for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any federal judge or court of competent jurisdiction.

Views here expressed also control the decision in the case of *Thomson v. Henry County*.

Judgment reversed, and the cause remanded with directions to sustain the demurrer and for further proceedings in conformity to the opinion of the court.

Justice Miller dissented.

HAGAN v. LUCAS.

Reported in 10 Peters, 400.
(1836.)

McLEAN, Justice, delivered the opinion of the court: The writ of error is prosecuted by the plaintiffs to reverse a judgment of the district court, vested with the powers of a circuit court, for the southern district of Alabama. The record in the district court states, that on the 14th of December, 1833, a judgment was entered in that court, in favor of John Hagan, against William D. Bynum and Alexander McDade, for the sum of \$2,972.58, besides costs; and that an execution was issued against the goods and chattels, lands and tenements of the defendants, which on the 19th of February, 1834, was levied on several slaves, that were claimed by Charles F. Lucas,

who gave bond to try the right of property. At the time of the levy, the slaves were in the possession of the claimant. And the question as to the right of property being brought before the court, under a statute of the state; the claimant, Lucas, as stated in the bill of exceptions, gave in evidence three records, certified by the clerk of the circuit court of Montgomery county, Alabama, of three judgments rendered in that court, at September term, for various amounts, against the above defendants, Bynum and McDade, and upon which judgments, it was proved, executions had regularly issued to the sheriff of Montgomery county, which, on the 10th of October, 1833, were levied on the same slaves taken in execution by the marshal, as above stated; and that the claimant filed his affidavit, on the 25th of November, 1833, in the mode prescribed by the statute; setting forth that the slaves were not the property of the defendants in the execution, but were his property, and gave bond and security to the sheriff, as required by the statute, for the forthcoming of said property, if it should be found subject to said execution; and for all costs and charges for the delay, etc. On the giving of this bond, the slaves were delivered to the possession of the claimant; and these proceedings were returned by the sheriff to the circuit court of Montgomery county. And the records showed, that at the March and November terms in 1834, the proceedings for the trial of the right of property were continued. The record was certified on the 4th of December, 1834.

Upon this evidence, the court instructed the jury, that if they believed, that previously to the levy of the marshal, the slaves had been levied on by the sheriff of Montgomery county, and that they had been delivered to Lucas, on his making oath and giving bond, as required by the statute; and if they believed, that the proceedings on said claim were still pending and undetermined in the circuit court; that the property was, in the opinion of the court, considered as in the custody of the law, and consequently, not subject to be levied on by the marshal.

And the counsel for the defendant objected to the records from the circuit court of Montgomery, as showing the pendency of the suit in that court, respecting the right of property;

as a term of the court had intervened between the certification of the record and the time of using it in evidence. But the court overruled the objection, saying, the pendency of the suit was a matter of fact for the jury to determine; and that they might infer, from the proof before them, that the suit was still pending; which presumption might be rebutted by the plaintiff in the execution, etc.

The statute of Alabama, under which this proceeding took place, was passed on the 24th of December, 1812; and provides, that where any sheriff shall levy execution on property, claimed by any person not a party to such execution, such person may make oath to such property; on which the sale shall be postponed by the sheriff, until the next term of the court; and the court is required to make up an issue to try the right of property, etc., and the claimant is required to give bond, conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him, etc.; and it is made the duty of the sheriff to return the property levied upon to the person out of whose possession it was taken, upon such person entering into bond, with security, to the plaintiff in execution, in double the amount of the debt and costs, conditioned for the delivery of the property to the sheriff, whenever the claim of the property so taken shall be determined by the court; and on failure to deliver the property, the bond, on being returned into the clerk's office, is to have the effect of a judgment.

The principal question in this case is, whether the slaves referred to were liable to be taken in execution, by the marshal, under the circumstances of the case. Had the property remained in the possession of the sheriff, under the first levy, it is clear, the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff

has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff; but this can not be done as between the marshal and the sheriff.

A most injurious conflict of jurisdiction would be likely often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction.

But it is insisted in this case, that the bond is substituted for the property; and consequently, that the property is released from the levy. The law provides, that the property shall be delivered into the possession of the claimant, on his giving bond and security in double the amount of the debt and costs, that he will return it to the sheriff, if it shall be found subject to the execution. Is there no lien on property thus situated, either under the execution or the bond? * * *

The bond given by the claimant Lucas, bears a strong analogy to a forthcoming bond. By the latter, the goods were to be delivered to the sheriff, on the day of sale; by the former the goods were to be delivered to the sheriff, as soon as the right shall be determined against the claimant. In neither bond is the plaintiff in the execution consulted, as is done in the replevy bond, as to the sufficiency of the surety; nor do either of these bonds, like the replevy bond, operate as a judgment, until a breach of the condition. In fact, the bond

under the Alabama statute is substantially a forthcoming bond.

In a late case, the supreme court of Alabama decided the same question which is made on this bond, on a bond given for the delivery of property under the attachment laws of that state. They decided, that the giving of the bond did not release the goods from the lien of the attachment. A contrary decision had been given by the court, in a case similar; but on further examination and more mature reflection, two of the three judges made the above decision. This adjudication being made on the construction of a statutory proceeding, and by the supreme court of the state, forms a rule for the decision of this court.

We think, that part of the charge to the jury by the district court, which respected the pendency of the suit in the state court, and which was excepted to, was substantially correct; and we are of opinion, that on principle and authority, and also under the construction given to the statute, by the supreme court of the state, the judgment of the district court must be affirmed.

See, in accord, *Taylor v. Carryl*, 20 Howard, 583 (1858), where the subject is extensively treated; note dissent of Taney, C. J. And in *Hyde v. Stone*, 20 Howard, 170, the court say, at 175: "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states can not be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They can not abdicate their authority or duty in any case in favor of another jurisdiction." And in *Suydam v. Broadnax*, 14 Pet. 67, it was held that a state statute exempting from suit the administrator of an insolvent estate did not operate to exempt from the suit of an out-of-the-state creditor suing in the federal court. See, also, *Sturges v. Crowninshield*, 4 Wh. 122, and *Ogden v. Saunders*, 12 Wh. 312, to the effect that a state bankrupt or insolvent law can not be construed to deprive a creditor of another state of his constitutional right to sue in the federal court.

INSURANCE COMPANY v. MORSE.

Reported in 20 Wallace, 445.
(1874.)

ERROR to the supreme court of Wisconsin; the case being thus:

A statute of Wisconsin, passed in 1870, enacts as follows:

“It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents, in this state, shall first appoint an attorney in this state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted.”

This statute being in force, the Home Insurance Company of New York, a corporation organized under the laws of the state of New York, and having its office and principal place of business in the city of New York, being desirous of doing business in the state of Wisconsin, established an agency there, and in compliance with the provisions of the above-quoted statute, filed in the office of the secretary of state of Wisconsin the appointment of H. S. Durand as their agent in it, on whom process might be served. The power of attorney thus filed contained this clause:

“And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or federal courts.”

Being thus established in the state, the company issued a policy of insurance to one Morse, and a loss having occurred, as was alleged, under it, Morse sued the company in the county

court of Winnebago, one of the state courts of Wisconsin, to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, under the twelfth section of the Judiciary Act of 1789, into the circuit court for the district. * * *

MR. JUSTICE HUNT delivered the opinion of the court: The refusal of the state court of Wisconsin to allow the removal of the case into the United States circuit court of Wisconsin, and its justification under the agreement of the company and the statute of Wisconsin form the subject of consideration in the present suit.

The state courts of Wisconsin held that this statute and their agreement under it justified a denial of the petition to remove the case into the United States court. The insurance company deny this proposition, and this is the point presented for consideration.

Is the agreement thus made by the insurance company one that, without reference to the statute, would bind the party making it?

Should a citizen of the state of New York enter into an agreement with the state of Wisconsin, that in no event would he resort to the courts of that state or to the federal tribunals within it to protect his rights of property, it could not be successfully contended that such an agreement would be valid.

Should a citizen of New York enter into an agreement with the state of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that state or the federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the state. There is no sound principle upon which such agreements can be specifically enforced.

We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A

man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he can not, as was held in *Cancemi's case*, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He can not, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void. * * * Upon its own merits, this agreement can not be sustained.

Does the agreement in question gain validity from the statute of Wisconsin, which has been quoted? Is the statute of the state of Wisconsin, which enacts that a corporation organized in another state shall not transact business within its limits, unless it stipulates in advance that it will not remove into the federal courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute in respect to such requisition, under the constitution of the United States?

The constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that constitution, the laws of the United States, and to the treaties made or which shall be made under their authority, * * * to controversies between a state and citizens of another state, and between citizens of different states.

The jurisdiction of the federal courts, under this clause of the constitution, depends upon and is regulated by the laws of the United States. State legislation can not confer jurisdiction upon the federal courts, nor can it limit or restrict the

authority given by congress in pursuance of the constitution. This has been held many times.

It has also been held many times, that a corporation is a citizen of the state by which it is created, and in which its principal place of business is situated, so far as that it can sue and be sued in the federal courts. This court has repeatedly held that a corporation was a citizen of the state creating it, within the clause of the constitution extending the jurisdiction of the federal courts to citizens of different states. * * *

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

The state of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the constitution of the United States. The requirements of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect. * * *

We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

On this branch of the case the conclusion is this:

1st. The constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the Act of 1789.

2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3d. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago county court erred in proceeding in the case after filing the petition and giving the security required by the Act of 1789, and that all subsequent proceedings in the state court are illegal and should be vacated. The judgment in that court, and the judgment in the supreme court of Wisconsin, should be *reversed*, and the prayer of the petition for removal should be *granted*. *Ordered accordingly*.

Rule adhered to in *Doyle v. Insurance Company*, 94 U. S. 535; and the latter followed in *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, where Justice Peckham reviews the cases, although a strong dissent is expressed by J.J. Day and Harlan, to the effect that the Doyle case was overruled by *Barron v. Burnside*, 121 U. S. 186, on the ground that the principles upheld in the two cases were antagonistic.

ABLEMAN v. BOOTH.

Reported in 21 Howard, 506.

(1858.)

MR. CHIEF JUSTICE TANEY delivered the opinion of the court: The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account, they have been argued and considered together; and the following are the facts as they appear in the transcripts before us:

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the Act of Congress of September 18, 1850. * * *

It will be seen, from the foregoing statement of facts,¹ that a judge of the supreme court of the state of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the

United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the state.

In the second case, the state court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

And it further appears that the state court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the Act of Congress of 1789, to bring here for examination and revision the judgment of the state court. •

These propositions are new in the jurisprudence of the United States, as well as of the states; and the supremacy of the state courts over the courts of the United States, in cases arising under the constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a state.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus*. But the paramount power of the state court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and

disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned; for, if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived

this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned.

It is, however, due to the state to say, that we do not find this claim of paramount jurisdiction in the state courts over the courts of the United States asserted or countenanced by the constitution or laws of the state. We find it only in the decisions of the judges of the supreme court. Indeed, at the very time these decisions were made, there was a statute of the state which declares that a person brought upon a *habeas corpus* shall be remanded, if it appears that he is confined:

“1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

“2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction.” (Revised Statutes of the state of Wisconsin, 1849, Ch. 124, p. 629.)

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the supreme court claims to have derived from the state.

But, as we have already said, questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that “this constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything

in the constitution or laws of any state to the contrary notwithstanding.’’

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the constitution and laws and treaties of the United States, and the powers granted to the federal government, would soon receive different interpretations in different states, and the government of the United States would soon become one thing in one state and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the constitution and laws and treaties of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the general government, in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the constitution and laws of the United States, and that in such cases, as well as the other there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of

a state or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the constitution itself was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the constitution and laws of the United States uniform, and the same in every state; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign states which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another state by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the states; for in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining states, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every state." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the state judges bound to

carry it into execution. And as the courts of a state, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the states, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

The constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this constitution" and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general government. And as the constitution is the fundamental and supreme law, if it appears that an act of congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the constitution is under their view when any act of congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the states, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and

deliberation of judicial inquiry. And no one can fail to see that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our government, state and national, would soon cease to be governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to congress to create it by law; for the states could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interest, and powerful political combinations, an act of congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influence or excited passions of the day. This tribunal therefore, was erected, and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the states, who formed and adopted that government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the constitution itself, and declared that this court should have appellate power in all cases arising under the constitution and laws of the United States. So long, therefore, as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon congress. That power is specifically given in Article I, Section 8, Paragraph 18, in the following words:

“To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

Under this clause of the constitution, it became the duty of congress to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department. And in the performance of this duty, the first congress, at its first session, passed the Act of 1789, Ch. 20, entitled, “An act to establish the judicial courts of the United States.” It will be remembered that many of the members of the convention were also members of this congress, and it can not be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the twenty-fifth section of the Act of 1789, congress authorized writs of error to be issued from this court to a state court, whenever a right had been claimed under the constitution or laws of the United States, and the decision of the state court was against it. And to make this appellate power effectual, and altogether independent of the action of state tribunals, this act further provides, that upon writs of error to a state court, instead of remanding the cause for a final decision in the state court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the Act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the first congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by states or state tribunals.

In the case before the supreme court of Wisconsin, a right was claimed under the constitution and laws of the

United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the district court of the United States, but it has reversed and annulled the provisions of the constitution itself, and the Act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of state court, or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding

him, to make known, by proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a *habeas corpus* issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government) shall be bound, by oath or affirmation, to support this constitution. This is the last and closing clause of the con-

stitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the constitution was submitted to the people of the several states, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government can not exist without it. Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this constitution*. And no power is more clearly conferred by the constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the state; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of the government, it seems to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court. And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by *habeas corpus* or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the state court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the district court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the supreme court of Wisconsin must therefore be reversed in each of the cases now before the court.

¹ The statement of facts is in great detail; the attention of the student is directed thereto as an illustration of the successive steps in procedure in such case.

Principles approved and followed in *Tarble's Case*, 13 Wall. 397 (1871); see *Ex parte Bushnell*, 9 O. S. 77, for same question decided in same way by the Ohio court. Note the procedure outlined in these two cases, both in state and federal courts.

In *The Mayor v. Cooper*, 6 Wall. 247, at p. 253 (1867), it is said: "It is the right and the duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before it, this court is the final arbiter. The decisions of the courts of the United States within their

sphere of action, are as conclusive as the laws of congress made in pursuance of the constitution. This is essential to the peace of the nation, and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. The courts of the several states might determine the same questions in different ways. There would be no uniformity of decisions. For every act of an officer, civil or military, of the United States, including alike the highest and the lowest, done under their authority, he would be liable to harassing litigation in the state courts. However regular his conduct, neither the constitution nor laws of the United States could avail him, if the views of those tribunals and of the juries which sit in them, should be adverse. The authority which he had served and obeyed would be impotent to protect him. Such a government would be one of pitiable weakness, and would wholly fail to meet the ends which the framers of the constitution had in view. They designed to make a government not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of this court have uniformly held that it is so."

In *Covell v. Heyman*, 111 U. S. 176 (1883), Mr. Justice Matthews, speaking for the court says: "The sole question presented for our decision is whether it was error in the state court to permit a recovery of the possession of property, thus held, against a marshal of the United States or his deputy, in behalf of the rightful owner, and whether, on the other hand, it should not have adjudged in favor of the defendant below, that his possession of the property by virtue of the levy under the writ was, in itself, a complete defense to the action of replevin, without regard to the rightful ownership. * * *

"The forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided; by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it, by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.

Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.' *Wayman v. Southard*, 10 Wheat. 1.

"Property thus levied on by attachment, or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right, to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him. That was the defense made and relied on by the plaintiff in error in the present case, and to which the supreme court of Michigan refused to give its due and conclusive effect. For that error its judgment is reversed, and the cause is remanded with directions to affirm the judgment of the circuit court for the county of Kent, in favor of the plaintiff in error; and *it is so ordered.*"

In *Robb v. Connolly*, 111 U. S. 624, Mr. Justice Harlan, speaking for the court, says: "What we decide—and the present case requires nothing more—is, that, so far as the constitution and laws of the United States are concerned, it is competent for the courts of the state of California, or for any of her judges—having power, under her laws, to issue writs of *habeas corpus*, to determine, upon writ of *habeas corpus*, whether the warrant of arrest and the delivery of the fugitive to the agent of the state of Oregon, were in conformity with the statutes of the United States; if so, to remand him to the custody of the agent of Oregon. And, since the alleged fugitive was not, at the time the writ in question issued, in the custody of the United States, by any of their tribunals or officers, the court or judge issuing it did not violate any right, privilege or immunity secured by the constitution and laws of the United States in requiring the production of the body of the fugitive upon the hearing of the return to the writ, to the end that he might be discharged if, upon hearing, it was adjudged that his detention was unauthorized by the act of congress providing for the arrest and surrender of fugitives from justice, or by the laws of the state in which he was found. * * * So, that a state court of original jurisdiction, having the parties before it, may consistently with existing federal legislation, determine cases at law or in equity, arising under the constitution or laws of the United States, or involving rights dependent upon such constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'

If they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final and conclusive determination. * * *

PLAQUEMINES FRUIT CO. v. HENDERSON.

Reported in 170 U. S. 511,
(1897.)

MR. JUSTICE HARLAN delivered the opinion of the court: This suit was commenced February 11, 1895, in the circuit court of the United States for the eastern district of Louisiana by the Plaquemines Tropical Fruit Company, a New Jersey corporation, against the defendants in error William Henderson and Henry J. Leovy, citizens of Louisiana.

It is, in effect, a suit to quiet the title of the plaintiff to certain lands in the Parish of Plaquemines in the state, and to restrain the defendants from committing trespasses thereon.

The defendants filed a joint and several plea, in which it was averred: That in 1892 a suit was instituted by the state of Louisiana in the civil district court of the Parish of Orleans, Louisiana, against the Plaquemines Tropical Fruit Company, Charles C. Buck, the vice-president of that company and a citizen of Maryland, and others, in which suit the state sought a decree adjudging it to be the owner of certain lands within its limits; in which action, the defendants having appeared, it was found by the verdict of a jury, and in accordance with the verdict it was adjudged by the court, that the lands here in question belonged to the state, and that the Plaquemines Tropical Fruit Company and Buck had no title thereto; that such judgment, upon the appeal of the company and Buck, was affirmed by the supreme court of Louisiana; that a writ of error sued out by the same defendants to this court was dismissed; that the lands the title to which is involved to this suit are part of those the title to which was involved in that action, that Henderson and Leovy acquired title from the state after the above judgment obtained by it had become final; and that such judgment remained unreversed and unmodified.

The defendants Henderson and Leovy pleaded the above proceedings and the judgment obtained by the state in bar of the present suit.

At the hearing below, the plaintiff having admitted the correctness in point of fact of the defendants' plea in bar, it was adjudged that the plea was sufficient. The bill was accordingly dismissed.

The contention of the appellant is that the civil district court of the Parish of Orleans could not, consistently with the constitution of the United States, take cognizance of any suit brought by the state of Louisiana against citizens of other states, and, consequently, its judgment, now pleaded in bar, was null and void. If that contention be overruled the judgment below must be affirmed; otherwise it must be reversed, and the cause remanded with directions to hold the plea insufficient.

The appellant, in support of its contention, insists that the entire judicial power surrendered to the United States by the people of the several states vested absolutely in the United States under the constitution; that by that instrument the nation acquired certain portions of the judicial power naturally inherent in sovereignty; that thereafter a state court could not, without the expressed consent of the United States, take cognizance of a case embraced in such cession of judicial power; and that the judicial power of the United States, not distributed by the constitution itself, can not be so distributed that a state court may take cognizance of a case or controversy to which that power is extended, if its determination thereof is not made by congress subject to re-examination by some court of the United States.

These propositions applied to the case before us mean that the civil district court of the Parish of Orleans was without jurisdiction to render judgment in the above suit instituted by the state, because there was no provision in the acts of congress whereby its judgment could be reviewed by some court of the United States. * * *

It can not be doubted that each of the original states had, prior to the adoption of the constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal

questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. *Tennessee v. Davis*, 100 U. S. 257.

If it was intended to withdraw from the states authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.

This was the view taken of this question by Chancellor Kent in his commentaries. Referring to the clause of the constitution relative to the judicial power of the United States, he said: "The conclusion then is, that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter." 1 Kent's Com. 400.

In *Gettings v. Crawford*, Taney's Dec. 1, the question was considered whether the ninth section of the Judiciary Act of 1789, giving jurisdiction to the district court of the United States of cases against consuls and vice-consuls, was consistent with the clause of the constitution providing that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." It was held that those words did not expressly exclude the jurisdiction of other courts of the United States in the cases mentioned. Chief Justice Taney observing: "The true rule in this case, is, I think,

the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same matter." That case, it is true, did not present any question as to the jurisdiction of the state courts, but it affirms the rule that the grant of original jurisdiction to a particular court in enumerated cases does not, of itself, import that the jurisdiction of that court is exclusive in such cases. If the clause just quoted is not to be interpreted as giving this court exclusive jurisdiction in cases affecting consuls, upon like grounds it can not be interpreted as giving this court exclusive jurisdiction in suits instituted by a state, simply because of the provision giving the supreme court original jurisdiction where the state is a party.

But the cases most directly in point are those reported under the title of *Ames v. Kansas*, 111 U. S. 449, 464. One was a suit against the Kansas Pacific Railway, a corporation organized under the laws of the United States; the other a suit against certain persons constituting the board of directors of the Union Pacific Railway Company and citizens of states other than Kansas. Both suits were brought by the state in one of its own courts. It was contended that as the state was a party to those suits, this court had exclusive jurisdiction. After observing that the evident purpose of the constitution was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government, this court said: "So much was due to the rank and dignity of those for whom the provision was made, but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden. Acting on this construction of the constitution, congress took care to provide

(in the original judiciary act), that no suit should be brought against an ambassador or other public minister except in the supreme court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the supreme court was made concurrent with the district courts, and suits of a civil nature could be brought against them in either tribunal. With respect to states it was provided that the jurisdiction of the supreme court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except, also between a state and citizens of other states, or aliens, in which latter case its jurisdiction should be original, but not exclusive. Thus the original jurisdiction of the supreme court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states, or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the supreme court exclusive original jurisdiction in suits against a state begun without its consent, and to allow the state to sue for itself in any tribunal that could entertain its case. In this way states, ambassadors and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that has the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way, or to any extent, it chose. * * *

As, under the long-settled interpretation of the constitution, the mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not, of itself, divest the state courts of jurisdiction to hear and determine such cases, and as congress has not invested the national courts with exclusive jurisdiction in cases of that kind, it follows that the courts of a state may, so far as the constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against

citizens of other states; subject, of course, to the right of the defendant to have such suit removed to the proper circuit court of the United States, whenever the removal thereof is authorized by the acts of congress, and subject, also to the authority of this court to review the final judgment of the state court, if the case be one within our appellate jurisdiction.

For the reasons stated, it is adjudged that the court below did not err in sustaining the plea, and its judgment is *affirmed*.

As to whether federal courts may enjoin proceedings in state court, see notes in *Carver v. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.

Sharon v. Terry, reported in 36 Fed. 337, 359, the court says: "Similar decisions might be cited from the highest courts of nearly every state; for upon the principle stated there is, with certain well-recognized exceptions, a general concurrence of opinion. Where two judgments, relating to the same subject, are irreconcilable, both can not be enforced. One or the other must give way, and the only reasonable test by which the superiority of one over the other is to be determined is that which is expressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it can not be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment, independently of the commencement of the suit, were to be the test, the superiority of judgment as counsel well observe, would depend on mere accident or circumstances beyond the power of the court or parties; as one court may have a large calendar, and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence, because it is enabled, from paucity of cases, to dispose of its calendar at an earlier day and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference. The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: First, where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are based upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations; or where the jurisdiction of a court of equity, as well as a court of law, is invoked by him with reference to the matter. Of course, a decision first rendered in either suit may be pleaded in the others. The plaintiff must abide the adjudication which he has sought. And, second, where the cases are upon con-

tracts or obligations, which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist."

See *Rodgers v. Pitt*, 96 Federal, 668, at p. 671, to same effect; *Freeman v. Howe*, 24 Howard, 450, for good discussion of same point, to same effect; and *Harkrader v. Wadley*, 172 U. S. 148, to same effect, and also holding that a circuit court of the United States, sitting in equity to administer civil remedies, has no jurisdiction to enjoin proceedings in a state court to enforce the criminal laws of such state; *Starr v. C. R. I. & P. Ry.*, 110 Federal, 3, where the subject is well summarized; *Dietsch v. Huidekoper*, 103 U. S. 494; and *Guardian Trust Co. v. Kansas City Sou. Ry. Co.*, 171 Federal, 43.

In *United States v. Press Pub. Co.*, 219 U. S. 1, is a careful discussion of the federal criminal jurisdiction over federal reservations.

In *Callahan v. United States*, 195 Federal, 924, conflict of jurisdiction between United States and state, where each can take jurisdiction, the one which first gets it holds it to the exclusion of the other. Rule same in criminal as in civil cases.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, note on 356 to 376.

In *Harris v. Dennie*, 3 Peters, 292, state sheriff attaches goods imported and United States marshal attaches same goods. Sheriff attached goods before arrival, and marshal attached after arrival, for duties due thereon. Right of United States declared superior, and state attachment is void.

b. No power in inferior federal court to review decision of state court.

HALL v. AMES.

Reported in 190 Federal, 138 (C. C. Ap.).
(1911.)

ALDRICH, District Judge: This case in effect raises the question whether the circuit court of the United States, under an independent and original bill, has authority, and ought, to review the proceedings, orders, and decrees of a state court of general jurisdiction, for the purpose of finding whether, in the course of the proceedings in that court, there was error in dealing with the subject-matter with which the litigation was concerned.

The opinion of the learned judge of the circuit court (182 Fed. 1008) shows an exhaustive examination of the questions now raised before us, and the treatment of these questions is so exhaustive that we might well rest our decision upon the reasoning of the opinion in the circuit court. We refer to

that opinion for a more complete description of the subject-matter of the controversy and of the proceedings in the state court than we shall undertake to give as reiteration is deemed unnecessary. We may, however, state that the parties plaintiff here were, upon original bill by the senior Hall and upon intervening process by others, parties plaintiff in the state court of Maine, a court of general jurisdiction, in which they voluntarily submitted their rights to that court, and sought relief in respect to the stock of the Machias Lumber Company, a Maine corporation, in which they were interested as stockholders; that the proceeding in that court was concerned with a certain trust agreement, which contained certain provisions as to sales, and also with a stipulation filed under order of court *pendente lite*, to which considerable importance was apparently attached by the Maine court as extending its jurisdiction as to parties and the kind of relief which should be granted.

The defendants here are the same as the defendants in the proceeding in the state court, and the subject-matter is the same as in that court; and, while the case was still pending at the time the bill was filed in the circuit court, the cause had well advanced toward a final decree in the state court.

The plaintiffs in their bill in the circuit court ask for an injunction in respect to rights which the state court sought to establish in behalf of the defendants; and this means, if the relief is to be granted, that the merits must be re-examined, and that what was done in the state court must be undone, because, as alleged and argued that court improperly sought to establish certain rights in respect to a sale of stock.

The general ground upon which relief is asked is that the state court undertook to establish property rights in respect to questions not in issue upon the pleadings, and in respect to property of persons who were not parties to the proceeding; but the particular ground is that what was done by the state court is a nullity because that court exceeded its authority.

There might be force in the argument upon the particular ground presented, that of alleged nullity, provided the orders and decrees of the state court, against which complaint is made, clearly assumed to deal with parties or with subject-

matter not involved in the litigation before it. But here the parties are the same, and the *res* is the same; and the *res* must be accepted as at least constructively in the custody of the courts of the state of Maine.

If the subject-matter were distinctly different and the parties not the same, the proposition would be quite a different one; but, as that was not the case with which the circuit court had to deal, it is quite unnecessary that this court should undertake to determine what the power of the circuit court would be with respect to the rights of parties under process of a state court of general jurisdiction, expressly directed against property which was not in the litigation before it. In the particular situation which we have to consider, it goes without saying that, if it were within the powers of a circuit court of the United States to afford the relief sought, it could not be done without an investigation of questions relating to the merits of the controversy in respect to the subject-matter before the state court and of questions relating to the regularity of the proceedings in that court.

At the arguments before us the views of the contending parties were stated with great force by able and experienced counsel; but, after all, nothing was urged which discloses any view not covered, and correctly covered, as we think, by the exhaustive opinion handed down in the circuit court.

If there is, under the federal constitution, power in the United States courts to deal with a case in which it is claimed that the rights of persons have been invaded through the exercise of authority by state courts under erroneous construction of the laws of the state in respect to their own jurisdiction or under unwarranted interpretations of the scope of the issues before them, it is quite certain that such power does not vest in the circuit court, under an independent collateral proceeding to review a cause heard and determined by a state court of general jurisdiction, to the end that the results of a proceeding in that court shall be overthrown. Not only is there no such reasonable authority existing in the circuit court of the United States as a court of review, but considerations of comity forbid attempts by one court, which would have had jurisdiction of the subject-matter and of the

parties if relief had been first sought therein, to interfere with the proceedings of other courts of general jurisdiction established by other governments.

In *Cornue v. Ingersoll*, 176 Fed. 194, 99 C. C. A. 548, certain parties instituted proceedings in the state court to have the question tried as to their ownership of a certain fund in the custody of the probate court in Massachusetts, against which the circuit court of the United States, under a mandate from the supreme court, had already formulated a lien decree. The effect of that proceeding was to set up that the United States courts had assumed to establish rights with respect to property not in their custody and with respect to parties not before them; and it was held, among other things, that the decree could not be collaterally attacked by a suit in the state court; and that if the case was one of judicial invasion of rights without notice, the grievance was one which did not require resort to independent process in another court—process which, in substance and effect, if maintained, must entirely ignore the intended operative effect of the decision of the supreme court affirming the proceedings in the circuit court, and that the rule which requires direct attack, and forbids collateral attack, upon final judgments and decrees, is a rule of public and judicial necessity, founded upon considerations which wholly exclude the idea of a laxity, as between courts of first instance general jurisdiction, which shall tolerate an independent collateral proceeding to disestablish in another court, and upon another trial, that which has been expressly established upon a former trial, upon the merits, in a court of general jurisdiction.

We see no reason why the same rule should not apply in this case. The Maine court was a court of general jurisdiction; and it assumed to establish certain property rights, and rights of sale, under its own ascertainment of its jurisdiction, resulting from the proceedings and the issues before it, and as enlarged by its own construction of a certain stipulation between the parties, which was an incident to the equitable proceeding which it was considering.

The proposition of the complainant in the circuit court, and here, in effect involves the idea that the circuit court

should review the controversy between the parties, including the questions in respect to the interpretation which the Maine court put upon its own powers as to the disposition of property constructively in its possession. The learned judge of the circuit court observed, and we think the observation sound, that that court could not on the record revise either directly or indirectly the proceedings of the supreme judicial court of Maine. It was there said:

“The rules which govern us are precisely the same as would govern any court of superior and general equity jurisdiction, whether as between a federal court and a state court, or *vice versa*.”

Again it was there said:

“But it is insisted that relief is sought for here which was not in issue before the supreme judicial court of Maine, or not disposed of by it. All these propositions are met by the fundamental fact that we can not get at those additional issues without walking over the body of what has been decided by that court, or held in reserve by it. We are not at liberty to restrict in any way the powers of that court over the subject-matter involved here either directly or indirectly with reference to what has been done or has not been done, or by anticipating what may or may not be done.”

It is quite true, as we think, in order to give the relief which the complainant seeks, and upon the ground upon which it is sought, that the circuit court would have to review the merits of the questions with reference to the subject-matter involved, the regularity of the proceedings in the state court, and the state court's interpretation of its jurisdiction and of the proceedings before it, together with its construction of the stipulation of the parties, which apparently, under the view of that court, enlarged its jurisdiction. The ground of the relief sought, therefore, necessarily contemplates that the circuit court shall review the whole situation, and disestablish rights which the state court has assumed to establish. This is something which we think the circuit court of the United States, under the judicial relations existing between the federal and the state governments, has no rights to do.

In some of the cases relied upon by the complainants, who are seeking this relief, the rights involved had reference to judgments or decrees set up in legal bar by parties holding the judgments or decrees, and where the constitutional full faith and credit was therefore demanded; and in others the questions were directly raised in the same or ancillary proceedings. But here the circuit court, in an independent and collateral proceeding, is asked to seize upon a controversy pending in the state courts, and to make different findings in respect to jurisdictional facts, and to give affirmative relief, which, if granted, must necessarily be based upon an overthrow of rights already ascertained and established in that court. This plan involves a very different proposition from that in the cases relied upon by the complainants. The plan here suggested would be quite subversive of the rules of right, and of the rules of comity, existing between courts whose jurisdiction in respect to a given subject-matter depends altogether upon the fact as to which court first assumed jurisdiction and sought to ascertain and establish the rights in controversy between the parties.

We are not called upon to define the extent of the authority of the supreme court of the United States under the provisions of the federal constitution in respect to the obligation of contracts, due process of law, and full faith and credit, an authority usually exercised by the supreme court upon writ of error to the state court, which, of course, is not a collateral but a direct proceeding in the same case to review the decision against which the attack is directed.

It is strongly urged that the circuit court had power to enjoin the parties from proceeding under the sale ordered by the state court, upon the ground that that court exceeded its authority in respect to the stock which was in controversy before it. But under the particular circumstances of this case, the question whether the state court exceeded its authority could not be ascertained without a review of the state court's determination of questions of construction and interpretation; and, if a circuit court of the United States has any authority whatever, in an independent proceeding, to determine an issue of nullity based upon alleged excessive

assumption of jurisdiction by a state court, when such an issue in the slightest degree necessitates an exercise of supervisory jurisdiction or a review of a state court proceeding—a proposition which we do not here discuss—it is quite safe to say that at most it would be much less than that exercised by the supreme court. * * *

In the circuit court below the application for injunction was denied, the bill was dismissed, and costs were given to the respondents, which decree was by the circuit court of appeals here affirmed.

c. Following state decisions in cases involving state statutes construed by state courts.

ROWAN v. RUNNELS.

Reported in 5 Howard, 134.

(1847.)

MR. CHIEF JUSTICE TANEY delivered the opinion of the court: This action was brought in the circuit court for the southern district of Mississippi, by the plaintiffs, upon a promissory note made to them by the defendant for \$2,950.70, dated March 27, 1839, and payable on the 1st of March, 1840.

The defendant offered in evidence that the only consideration of this note was certain slaves sold by the plaintiff to him in Mississippi in the year 1836, this note being given to take up former securities which had not been paid; and that the said slaves were introduced and imported into the state in the year last above mentioned, by the plaintiffs, as merchandise and for sale.

Upon this evidence, the court instructed the jury that if the slaves were so introduced after the 1st of May, 1833, the note was void, and their verdict must be for the defendant. The plaintiffs excepted to this instruction, and the verdict and judgment being against them, they have brought the case here by writ of error.

The circuit court held this contract to be illegal and void, under the following section of the constitution of Mississippi, adopted in 1832.

“The introduction of slaves into this state, as merchandise or for sale, shall be prohibited from and after the 1st day

of May, 1833; provided the actual settler or settlers shall not be prohibited from purchasing slaves in any state in this Union, and bringing them into this state for their own individual use, till the year 1845.’’

The question presented in this case is precisely the same with that decided by this court in the case of *Groves v. Slaughter*, reported in 15 Pet. 449. And the court then held, after hearing a very full and elaborate argument, that the clause in the Mississippi constitution relied on by the defendant, which went into operation on the 1st of May, 1833, did not of itself prohibit the introduction of slaves as merchandise and for sale; and that contracts for the purchase and sale of slaves so introduced, made before the passage of the law of that state of May 13, 1837, were valid and binding upon the parties. The reasoning, upon which that opinion was founded, is fully set forth in the report of the case and need not be repeated here.

It now appears, however, that the question has since been brought before the courts of the state, and it has been there settled by its highest tribunals that the clause in the constitution above referred to did, of itself and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale; and rendered all contracts for the sale of such slaves, made after May 1, 1833, illegal and void. And it is argued that inasmuch as this court adopts the construction given by the state courts to their own constitution and laws, we ought to follow the decisions in Mississippi, and declare the contract before us to be void, notwithstanding the case of *Groves v. Slaughter*.

But we are not aware of any decision in this court which presses the rule so far, or that would justify this court in declaring contracts to be void upon this ground which upon the fullest consideration it has so recently held to be good. It will be seen, by a reference to the opinion delivered in the case of *Groves v. Slaughter*, that the court were satisfied not only that the construction it then placed on the constitution of Mississippi was the true one, but that it conformed to the construction upon which the legislature of the state had acted, and that the validity of these sales had not been brought into

question in any of the tribunals of the state until long after the time when this contract was made; and that as late as the beginning of the year 1841, when *Groves v. Slaughter* was decided, it did not appear, from anything before the court, that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the state.

Acting under the opinion thus deliberately given by this court, we can hardly be required, by any comity or respect for the state courts, to surrender our judgment to decisions since made in the state, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly this court will always feel itself bound to respect the decisions of the state courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawfully made. For, if such a rule were adopted, and the comity due to state decisions pushed to this extent, it is evident that the provision in the constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become utterly useless and nugatory.

We are of opinion, therefore, that the decision in the case of *Groves v. Slaughter* must rule this case, and consequently that the judgment of the circuit court must be reversed.

The same judgment must also be given in the other case before us between the same parties, as it depends on the same principles.

Riggs v. Johnson County, 6 Wall. 166 (see above p. 62); *Hagan v. Lucas*, 10 Pet. 400 (see above p. 71).

GELPCKE v. CITY OF DUBUQUE.

Reported in 1 Wallace, 175.

(1863.)

THE city of Dubuque issued a large amount of coupon bonds, which were now in the hands of the plaintiffs. The

bonds bore date on the 1st of July, 1857, and were payable to Edward Langworthy, or bearer, on the 1st of January, 1877, at the Metropolitan Bank, in the city of New York. The coupons were for the successive half year's interest accruing on the bonds respectively, and were payable at the same place. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company (one of the roads to which, by the act last mentioned, the city was authorized to subscribe), and that for the due payment of their principal and interest, "the said city is hereby pledged, in accordance with the Code of Iowa, and an Act of the General Assembly of the state of Iowa, of January 28, 1857," the act just referred to. The coupons on the bonds not being paid, the plaintiffs sued the city of Dubuque in the district court of the United States for the district of Iowa, claiming to recover the amount specified in the coupons, with the New York rate of interest from the time of their maturity and exchange on the city of New York.

MR. JUSTICE SWAYNE delivered the opinion of the court: The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

The act incorporating the city, approved February 24, 1847, provides as follows:

"SECTION 27. That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act approved January 8, 1851, the act of incorporation was "so amended as to empower the city council to levy annually a special tax to pay interest on such loans as are authorized by the twenty-seventh section of said act."

An act approved January 28, 1857, contains these provisions:

"That the city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western

and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing \$250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D., 1856. Said bonds shall be legal and valid, and the city council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the twenty-seventh section of the act of incorporation are now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the Act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the supreme court of Iowa, in *McMillen v. Boyles*, and again in *McMillen, et al. v. The County Judge and Treasurer of Lee County*. The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject.

It is claimed "that the legislature of Iowa had no authority under the constitution to authorize municipal corporations

to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the constitution of the state:

"ARTICLE I, SECTION 6. All laws of a general nature shall have a uniform operation."

"ARTICLE III, SECTION 1. The legislative authority of the state shall be vested in a senate and house of representatives, which shall be designated as the general assembly of the state of Iowa," etc.

"ARTICLE VII. The general assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," etc. The exceptions stated do not relate to this case.

"ARTICLE VIII, SECTION 2. Corporations shall not be created in this state by special laws, except for political or municipal purposes, but the general assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The state shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted:

1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

2. That the seventh article of the constitution prohibits the conferring of such power under the circumstances stated in the answer—debts of counties and cities being, within the meaning of the constitution, debts of the state.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the supreme court of Iowa: *Dubuque Co. v. The Dubuque & Pacific R. R. Co.* (4 Greene, 1); *The State v. Bissel* (4 Id. 328); *Clapp v. Cedar Co.* (5 Iowa, 15);

Ring v. County of Johnson (6 Id. 265); *McMillen v. Boyles* (6 Id. 304); *McMillen v. The County Judge of Lee Co.* (6 Id. 393); *Games v. Robb* (8 Id. 193); *State v. The Board of Equalization of the County of Johnson* (10 Id. 157). The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the supreme court of the state, in the later case of *The State of Iowa, ex relatione, v. The County of Wapello*, and it is insisted that in cases involving the construction of a state law or constitution, this court is bound to follow the latest adjudication of the highest court of the state. *Leffingwell v. Warren* is relied upon as authority for the proposition. In that case this court said it would follow "the latest settled adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It can not be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation

can not be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed.

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts giving constructions to the laws and constitutions of their own states. It is the settled rule of this court in such cases, to follow the decisions of the state courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion. *Judgment and mandate accordingly.*

MR. JUSTICE MILLER, dissenting: The supreme court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more

recent decision of the Iowa court, this court would not hold them valid.

Not only is the decision of the court, as I think, thus unsound in principle, but it appears to me to be in conflict with its former decisions on this point, as I shall now attempt to show. * * * (Authorities are here discussed.)

I think I have sustained, by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes. This invasion is made in a case where there is no pretence that the constitution, as thus construed, is any infraction of the laws or constitution of the United States.

The importance of the principle thus for the first time asserted by this court, opposed, as it is, to my profoundest convictions of the relative rights, duties, and comities of this court, and the state courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do my protest against it.

Decision in this case was affirmed in *Meyer v. Muscatine*, 1 Wallace, 384; the same rule was expressed in *Loeb v. Trustees*, 179 U. S. 472, 492, and in *Wilkes County v. Coler*, 180 U. S. 506, 531.

In *Ohio Life Ins. Co. v. Debolt*, 16 Howard, 416, at p. 431, C. J. Taney, speaking for the court, says: "And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where these decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made. * * *

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

In *Burgess v. Seligman*, 107 U. S. 20, at page 33, the court, Bradley, J., says: "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contract and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered

decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

"As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail." (See collection of cases bearing on this question in the note on page 34 of this report.)

See *Sioux Remedy Co. v. Cope*, 235 U. S. 197, involving question whether a certain state statute applied to transactions in interstate commerce; *Maiorano v. B. & O. Ry.*, 213 U. S. 268, involving statute giving right to sue for death by wrongful act; *Moore-Mansfield Co. v. Electrical Co.*, 234 U. S. 619, relating to right to mechanic's lien.

d. In procedure.

BEERS v. HAUGHTON.

Reported in 9 Peters, 329.
(1835.)

MR. JUSTICE STORY delivered the opinion of the court: This is a writ of error to the judgment of the circuit court for the district of Ohio.

The material facts are these. In June, 1830, the plaintiffs in error (who are citizens of New York) brought an action of *assumpsit* in the circuit court of Ohio, against one Joseph Harris and Cornelius V. Harris, and at the December term of the court, recovered judgment for 2818 dollars and 86 cents and costs. In this action the defendant in error became special bail by recognizance, viz., that the Harris's should pay and satisfy the judgment recovered against them, or render themselves into the custody of the marshal of the district of Ohio. In October, 1831, a writ of *capias ad satisfaciendum* was issued upon the same judgment, directed to the marshal; who, at the December term, 1831, returned that the Harris's were not to be found. At the same term the circuit court adopted the following rule, "that if a defendant,

upon a *capias*, does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under *mesne* nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has for such demand been released from imprisonment." In February, 1831, Cornelius V. Harris was duly discharged from imprisonment for all his debts, under the insolvent law of Ohio, passed in 1831; and in February, 1832, Joseph Harris was in like manner discharged. In December, 1832, the plaintiffs in error commenced the present action of debt, upon the recognizance of bail, against the defendant in error; stating, in the declaration, the original judgment, the defendant becoming special bail, and the return of the execution, "Not found." The defendant, among other pleas, pleaded the discharge of the Harris's under the insolvent law of Ohio of 1831, and the rule of the circuit court, above mentioned, in bar of the action. The plaintiffs demurred to the plea, and, upon joinder in demurrer, the circuit court gave judgment for the defendant; and the present writ of error is brought to revise that judgment.

The question now before this court is, whether the plea contains a substantial defense to the action of debt brought upon the recognizance of special bail. In order to clear the case of embarrassment from collateral matters, it may be proper to state, that the recognizance of special bail being a part of the proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court and the principles of law applicable thereto. Whatever in the sense of those rules and principles will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. Now, by the rules of the circuit court of Ohio, adopted as early as January term, 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal at any time before or after judgment against the principal; provided such sur-

render shall be before a return of a *scire facias* executed, or a second *scire facias nihil*, against the bail. And this in fact constituted a part of the law of Ohio at the time when the present recognizance was given; for in the Revised Laws of 1823, 1824 (22d vol. of Ohio Laws, 58), it is enacted that, subsequent to the return of the *capias ad respondendum*, the defendant may render himself or be rendered in discharge of his bail, either before or after judgment; provided such render be made at or before the appearance day of the first *scire facias* against the bail returned *scire feci*, or of the second *scire facias* returned *nihil*, or of the *capias ad respondendum* or summons in an action of debt against the bail or his recognizance returned served; and not after. This act was in force at the time of the passage of the Act of Congress of the 19th of May, 1828, Ch. 68, and must therefore, be deemed as a part of the "modes of proceeding" in suits to have been adopted by it. So that the surrender of the principal by the special bail within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of legal right.

And this constitutes an answer to that part of the argument at the bar, founded upon the notion, that by the return of the *capias ad satisfaciendum*, the plaintiffs had acquired a fixed and absolute right against the bail; not to be affected by any rules of the court. So far from the right being absolute, it was vested *sub modo* only, and liable to be defeated in the events prescribed by the prior rules of the court, and the statute of Ohio above referred to. It is true, that it has been said that by a return of *non est inventus* on a *capias ad satisfaciendum*, the bail are fixed: but this language is not strictly accurate; even in courts acting professedly under the common law and independently of statute. Lord Ellenborough, in *Mannin v. Partridge*, 14 East's Rep. 599, remarked that "bail were to some purposes said to be fixed by the return of *non est inventus* upon the *capias ad satisfaciendum*: but if they have, by the indulgence of the court, time to render the principal until the appearance day of the last *scire facias* against them, and which they have the capacity of using, they can not be considered as completely and definitely fixed till

that period.” And so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an *exoneretur* to be entered in such cases of indulgence, as well as in cases of strict right. But there is this distinction; that where the bail were entitled to be discharged, *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding; but they may plead the matter as a bar to a suit in their defense. But where the discharge is matter of indulgence only, the application is to the discretion of the court, and an *exoneretur* can not be insisted on except by way of motion.

And this leads us to the remark, that where the party is, by the practice of the court, entitled to an *exoneretur* without a positive surrender of the principal, according to the terms of the recognizance, he is, a *fortiori*, entitled to insist on it by way of defense, where he is entitled, *ex debito justitiæ*, to surrender the principal. Now, the doctrine is clearly established, that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender. This was decided in *Mannin v. Partridge*, 14 East, 599; *Boggs v. Teackle*, 5 Binn. Rep. 332; and *Olcott v. Lilly*, 4 Johns. Rep. 407. And, a *fortiori*, this doctrine must apply where the law prohibits the party from being imprisoned at all; or where, by the positive operation of law, a surrender is prevented. So that there can be no doubt, that the present plea is a good bar to the suit, notwithstanding there has been no surrender; if by law the principal could not, upon such surrender, have been imprisoned at all.

This constitutes the turning point of the case, and to the consideration of it we shall now proceed. In the first place, there is no doubt, that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract; and a discharge of the person of the party from im-

prisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects. This was clearly settled by this court in the cases of *Sturges v. Crowninshield*, 4 Wheat. Rep. 200; and *Mason v. Haile*, 12 Wheat. Rep. 370. In the next place, it is equally clear, that such state laws have no operation *proprio vigore*, upon the process or proceedings in the court of the United States; for the reasons so forcibly stated by Mr. Justice Johnson, in delivering the final opinion of the court in *Ogden v. Saunders*, 12 Wheat. Rep. 213; and by Mr. Chief Justice Marshall in delivering the opinion of the court in *Wayman v. Southard*, 10 Wheat. Rep. 1; and by Mr. Justice Thompson in delivering the like opinion in the *Bank of the United States v. Halstead*, 10 Wheat. Rep. 51.

State laws can not control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress they are obligatory. Beyond this, they have no controlling influence. Congress may adopt such state laws directly by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States. Examples of both sorts exist in the national legislation. The Process Act of 1789, Ch. 21, expressly adopted the forms of writs and modes of process of the state courts, in suits at common law. The Act of 1792, Ch. 36, permanently continued the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, then in use in the courts of the United States, under the Process Act of 1789; but with this remarkable difference, that they were subject to such alterations and additions as the said courts respectively should, in their discretion, deem expedient: or to such regulations as the supreme court of the United States should think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same. The constitutional validity and extent of the power thus given to the courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding

in suits, was fully considered by this court in the case of *Wayman v. Southard*, 10 Wheat. Rep. 1; and the *Bank of the United States v. Halstead*, 10 Wheat. Rep. 51. It was there held, that this delegation of power by congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit, embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that "a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered;" and that "this provision enables the courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September, 1789." The result of this doctrine, as practically expounded or applied in the case of the *Bank of the United States v. Halstead*, is, that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether *mesne* or final, and the modes of proceeding under it; so that it may reach property not liable, in 1789, by the state laws to be taken in execution, or may exempt property, which was not then exempted, but has been exempted by subsequent state laws.

If, therefore, the present case stood upon the mere ground of the authority conferred on the courts of the United States by the Acts of 1789 and 1792, there would seem to be no solid objection to the authority by the circuit court of Ohio to make the rule referred to in the pleadings. It is no more than a regulation of the modes of proceeding in a suit, in order to conform to the state law of Ohio, passed in 1831, for the relief of insolvent debtors. A regulation of the proceedings upon bail bonds and recognizances, and prescribing the conduct of the marshal in matters touching the same; seems to be as completely within the scope of the authority, as any which could be selected.

But in fact the present case does not depend upon the provisions of the Acts of 1789 or 1792; but it is directly within and governed by the Process Act of the 19th of May, 1828, Ch. 68. That act in the first section declares, that the forms of *mesne* process, and the forms and modes of proceeding in suits at common law in the courts of the United States, held in states admitted into the Union since 1789 (as the state of Ohio has been) shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction in the same; subject to such alterations and additions as the said courts of the United States, respectively, shall in their discretion, deem expedient, or to such regulations as the supreme court shall think proper from time to time, by rules, to prescribe to any circuit or district court concerning the same. The third section declares, that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and “the proceedings thereupon,” shall be the same in each state, respectively, as are now used in the courts of such state, etc. Provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in such courts, as to conform the same to any change which may be adopted by the legislature of the respective state, for the state courts.

This act was made after the decisions in *Wayman v. Southard*, and the *Bank of the United States v. Halstead*, 10 Wheat. 1 and 51, and was manifestly intended to confirm the construction given in those cases to the Acts of 1789 and 1792, and to continue the like powers in the courts to alter and add to the processes whether *mesne* or final, and to regulate the modes of proceedings in suits and upon processes, as had been held to exist under those acts. The language employed seems to have been designed to put at rest all future doubts upon the subject. But the material consideration now to be taken notice of, is that the Act of 1828 expressly adopts the *mesne* processes and modes of proceeding in suits at common law, then existing in the highest state courts under the state laws; which of course included all the regulations of the state laws as to bail, and exemptions of the party from arrest and

imprisonment. In regard also to writs of execution and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares that they shall be the same as were then used in the courts of the state. Now, the words "the proceedings on the writs of execution and other final process," must from their very import, be construed to include all the laws which regulate the rights, duties and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and also all the exemptions from arrest or imprisonment under such process created by those laws.

We are then led to the inquiry, what were the laws of Ohio in regard to insolvent debtors at the time of the passage of the Act of 1828? By the Insolvent Act of Ohio, of the 23d of February, 1824 (Laws of Ohio, Revision of 1824, volume 22, sections 8, 9, pp. 327, 328), which continued in force until it was repealed and superseded by the Insolvent Act of 1831, it is provided, that the certificate of the commissioner of insolvents, duly obtained, shall entitle the insolvent, if in custody upon *mesne* or final process in any civil action, to an immediate discharge therefrom, upon his complying with the requisites of the act. And it is further provided, that the final certificate of the court of common pleas, duly obtained, shall protect the insolvent forever after from imprisonment for any suit or cause of action, debt or demand mentioned in the schedule given in under the insolvent proceedings; and a penalty is also inflicted upon any sheriff or other officer, who should knowingly or willfully arrest any person contrary to this provision. The Act of 1831 (Laws of Ohio, Revision of 1831, volume 29, sections 21, 36, pp. 333, 336), contains a similar provision, protecting the insolvent under like circumstances from imprisonment, and making the sheriff or other officer, who shall arrest him contrary to the act, liable to an action of trespass. Now, the repeal of the Act of 1824, by the Act of 1831, could have no legal effect to change the existing forms of *mesne* or final process, or the modes of proceeding thereon in the courts of the United States, as adopted by congress, or to vary the powers of the same courts in relation thereto; but the same remained in full force, as if no such

repeal had taken place. The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the Act of 1828, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject.

Upon these grounds, without going into a more elaborate review of the principles applicable to the case, we are of opinion that the judgment of the circuit court was right; and that it ought to be affirmed with costs.

In *Hudson v. Parker*, 156 U. S. 277, the court reviews its authority to make rules governing procedure, especially on error or appeal under the act of March 3, 1891.

See *Wayman v. Southard*, 10 Wh. 1, holding that the Kentucky statutes relating to executions are not applicable to executions on judgments rendered in the federal courts, and *United States Bank v. Halstead*, 10 Wh. 51, to the same effect.

REVISED STATUTES OF UNITED STATES.

SECTION 913. The forms of *mesne* process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said court, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

SECTION 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

SECTION 915. In common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies,

by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.

SECTION 916. The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

SECTION 917. The supreme court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts.

SECTION 918. The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation,

and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

O'CONNELL v. REED.

Reported in 5 C. C. A. 586 (56 Fed. 531).

(1893.)

SANBORN, Circuit Judge: On December 4, 1891, Simon Reed and Thomas Murdoch, the defendants in error and the plaintiffs below, who were citizens of Illinois, brought an action in the circuit court for the district of Kansas against T. J. O'Connell, the plaintiff in error, who was a citizen of Kansas, for \$2,239.70, for goods sold and delivered. Their petition contained two counts—one for \$338.71, then due, and the other for \$1,900.99, not due. The defendant demurred to the petition on the grounds (1) that the court had no jurisdiction of the defendant, or of the subject of the action; (2) that the plaintiffs had no legal capacity to sue; (3) that several causes of action were improperly united; and (4) that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and this ruling is the supposed error complained of. Judgment was entered in favor of the plaintiffs, and the defendant brought this writ of error to reverse it.

The only question presented by this record is whether two causes of action—one for debt due, and the other for a debt not due—and both arising out of the same running account for goods sold, were improperly united in this petition. The Code of Civil Procedure of the state of Kansas provides that in a civil action for the recovery of money the plaintiff, at or after the commencement of the action, may have an attachment against the property of the defendant on several grounds, one of which is, when the defendant "has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud, hinder, or delay his creditors" (Section 190), and that an order of attachment shall be made by the clerk of the court in which the action is brought, when the proper affidavit is filed (Section 191). On the day this action was commenced the plaintiffs caused an order of attachment to be issued by the clerk, upon the grounds

stated in the quotation marks above, on the debt of \$338.71, that was due. The same code provides that "where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor" (Section 230); that the attachment authorized by Section 230 may be granted by the court or judge upon the filing of a proper affidavit (Section 231); that in all such actions an application for an attachment must be made; that the action shall be dismissed if the court or judge refuses to grant it (Section 232); and that the plaintiff in such an action shall not have judgment on his claim before it is due, but the proceedings upon the attachment may be conducted without delay (Section 235). On the same day that this action was commenced the plaintiffs filed the proper affidavit, obtained from the judge an order for an attachment, and caused it to issue, on the claim of \$1,900.99, that was not due.

The Kansas Code also provides that "the plaintiff may unite several causes of action in the same petition, * * * where they all arise out of either one of the following classes; First, the same transaction, or transactions connected with the same subject of action; second, contracts express or implied, * * * (Section 83); that the defendant may demur to the petition when it appears on its face that several causes of action are improperly joined (Section 89); and that, "when demurrer is sustained on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and an action shall be docketed for each of said petitions and the same shall be proceeded in without further service" (Section 92).

In *Wurlitzer v. Suppe*, 38 Kan. 31, 15 Pac. Rep. 863 (decided in 1887), the supreme court of Kansas sustained a demurrer to a petition, and held that a count for moneys due and one for moneys not due, under the statutes above referred to, were improperly joined in one petition, on the ground that the claim for moneys not due was not a cause of action, although the statute authorized the claimant to bring and maintain an action upon it. The contention of counsel for the defendant is that this decision is a construction of the statutes of Kansas by the highest judicial tribunal of that state; that the federal courts are bound to follow this decision, by the rule that they will adopt the construction of state statutes announced by the highest judicial tribunal of that state, and by the act of congress conforming the pleadings and practice in the circuit and district courts, in actions at law, to those of the states in which they are established; that the court below should therefore have sustained the demurrer, separated the two counts of the petition in two separate actions, according to the statutes and practice in Kansas, and* then, as the amount in dispute in each would thus have become less than the \$2,000 required to give jurisdiction to the circuit court, that that court should have dismissed both actions for want of jurisdiction.

By the Act of Congress of March 3, 1887, and the Act of August 13, 1888, for its correction (24 Stat. 552, Ch. 373; 25 Stat. 434, Ch. 866), jurisdiction was conferred on the circuit courts of the United States in any civil suit in which a controversy arises between citizens of different states, and the amount in dispute exceeds \$2,000, exclusive of interest and costs. When this action was commenced the amount in dispute therein was \$2,239.70, and the controversy concerning this amount has arisen between citizens of different states. The circuit court then had jurisdiction of this action. The jurisdiction of that court had been defined and limited by acts of congress, and could neither be restricted nor enlarged by the statutes of a state. *Toland v. Sprague*, 12 Pet. 300, 328; *Cowless v. Mercer Co.*, 7 Wall. 118; *Railway Co. v. Whitton*, 13 Wall. 270, 286; *Phelps v. Oaks*, 117 U. S. 236, 239, 6 Sup. Ct. Rep. 714. If the state of Kansas had enacted a statute that

no action for a larger amount than \$1,500 should ever be brought in that state, but that a claimant might bring a separate action for each \$1,500, or part thereof, that was owing him, such a statute would not have affected the jurisdiction of the circuit court to determine controversies between citizens of different states, involving larger amounts. Are the federal courts bound to follow the decision of a supreme court of a state giving a construction to state statutes, and establishing a practice, which compels the separation of this action, of which the circuit court now has jurisdiction, into two separate actions, of which it will not have jurisdiction?

It may be conceded that it is the settled rule of the federal courts to adopt the construction given by the highest judicial tribunal of a state to its local statutes involving rules of property, and to its state constitution and tax or revenue laws, where that construction violates no provision of the federal constitution, or of the federal laws. All the authorities cited by counsel for the defendant, with the exception of *Glenn v. Sumner*, 132 U. S. 156, 10 Sup. Ct. Rep. 41, and *People's Bank v. Batchelder Egg Case Co.*, 4 U. S. App. 603, 609, 2 C. C. A. 126, 51 Fed. Rep. 130, only illustrate this principle. Thus, in *Nichols v. Levy*, 5 Wall. 433, 444, where the supreme court of Tennessee had construed a statute of that state to embrace certain trusts in real estate, and to exempt the land in dispute from liability to judgment creditors, the supreme court adopted its construction with the remark: "Being a local statute, and involving a rule of real property, we adopt the construction which has been given to it by the highest judicial tribunal of the state." And in *Nesmith v. Sheldon*, 7 How. 812, where, under a provision of the constitution of Michigan prohibiting its legislature from "passing any act of incorporation, unless with the assent of at least two-thirds of each house" the supreme court of that state had held that two-thirds of each house must sanction and approve each individual charter, the supreme court promptly adopted this construction. These two cases fairly illustrate this class of authorities, and they are far from holding that the federal courts are bound to follow any construction of a statute or any practice established by a state court that would affect the jurisdiction of their courts,

or hinder or incumber the administration of the law in any of their tribunals.

The Act of Congress of June 1, 1872, Section 5 (17 Stat. 197, Ch. 255; Rev. St. 914), provides that "the practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." The purpose of this act was to conform the pleadings, practice, and modes of procedure in the federal courts, in actions at law, to those prevailing in the state courts under the codes of the various states in which they were established, so that lawyers who were practicing in both the state and federal courts would be relieved of the burden of studying two systems of pleading and practice. Under this act, wherever the pleadings, practice and modes of procedure in the state courts, as they have been established by the statutes of a state, and the decisions of its highest judicial tribunal, do not impede the administration of the law, or the efficiency of the federal courts, they are, and ought to be, followed in those courts. In other words, in matters where it is important that the rule of practice or procedure in the state and federal courts shall be uniform, but largely immaterial what that rule shall be, the pleadings, practice, and procedure in the federal court must, under this statute, conform to those in vogue in the state courts under the statutes of the state. In passing upon questions of this character the federal courts frequently remark that they are governed by the practice or the statutes or the decisions of the courts of the state in which they are held. The two cases relating to practice and modes of procedure cited by counsel for defendant (*Glenn v. Sumner*, *supra*, and *People's Bank v. Batchelder Egg Case Co.*, *supra*) are illustrations of this rule. In the former case the only question was whether or not all of the issues were decided in favor of the defendant, under the Code of Civil Procedure of North Carolina, by a general verdict in his favor. In the latter case the question under consideration was the power of the

circuit court to allow an amendment to proceedings in attachment—a power that that court had regardless of the decisions of the state courts under the Act of September 24, 1789 (1 Stat. p. 91, Ch. 20, Section 32; Rev. Stat. Section 954), which provides that any court of the United States “may at any time permit either of the parties to amend any defect in process or pleading upon such conditions as it shall, in its discretion, and by its rule, prescribe,” and by the uniform practice in the circuit courts, even where the rule in the state courts does not permit the exercise of such power. *Erstein v. Rothschild*, 22 Fed. Rep. 61, 64. The decisions of the supreme court of Arkansas, under the statutes of that state, were in accord with the federal statutes and practice, and this court cited and followed them. The opinions in these cases apply to questions of the class to which we have just referred; and upon those questions the decisions of the highest judicial tribunals of the states, construing their statutes governing pleading, practice, and procedure in common law actions, are uniformly followed by the federal courts, as there stated.

But on the other hand, the courts of the United States are not subordinate to the courts of the states. They constitute an independent judiciary system, the judges of which do not derive their powers from the states, nor can the legislation of the states, or the decisions of their courts, determine the limits of those powers, or prescribe the duties their exercise imposes. One of the objects of the establishment of the federal courts, with jurisdiction to determine controversies between citizens of different states, was to provide a tribunal in each state where the rights of citizens of other states might be determined, unaffected by any possible influence that friendship for, or acquaintance with, a resident defendant might sometimes have in the local courts of his county. It was not the purpose of the act conforming the pleadings and practice of the federal courts to those of the state courts to prevent, or even to hinder, the accomplishment of this, or any other object for which the federal courts were established. It was not the intention of congress to require, by the passage of this act of conformity, the adoption by the circuit courts of any rule of pleading, practice, or procedure enacted by state statute, or announced

by the decision of a state court, which would enlarge or restrict the jurisdiction of the federal courts, or prevent the wise administration of the law in the light of their own system of jurisdiction, as defined by their own constitution, as tribunals, and the acts of congress upon that subject. On the other hand, that act expressly reserves to the judges of those courts the right, and we think, imposes upon them the duty, in the exercise of a wise judicial discretion, to reject any statute, practice, or decision that would have such an effect. Our views of the effect of this act of congress, and of the right and duty of the judges of the federal courts to reject statutes of the various states, rules of practice, and decisions of state courts that are antagonistic to the federal system of jurisprudence, or that tend to defeat the ends of justice, as administered in the federal tribunals, are well illustrated by the decisions upon this question rendered by the supreme court since the passage of this act, in 1872. * * *

(Here the court discusses cases, and proceeds:) In this action there is a controversy between citizens of different states, sufficient in amount to give the circuit court jurisdiction. Congress has given the plaintiffs the right to have that controversy determined in that court, and it has imposed upon the circuit court the duty of determining it. To follow the practice adopted by the Kansas courts, to divide the amount in dispute here between two actions, of which the circuit court would not have jurisdiction, and to dismiss those actions, would be to "unwisely incumber the administration of the law," and would "tend to defeat the ends of justice." The demurrer was rightly overruled, and the judgment is affirmed, with costs.

SHEPARD v. ADAMS.

Reported in 168 U. S. 618.

(1898.)

THIS was an action brought in the District Court of the United States for the District of Colorado, by Frank Adams, receiver of the Commercial National Bank of Denver, against J. B. Shepard on a promissory note, dated June 7, 1893, wherein said Shepard promised to pay to the said bank, thirty days after date, the sum of twenty thousand dollars.

A writ of summons, in the form prescribed by the rule of that court, was sued out against the said defendant on the 24th day of August, 1895, whereby he was required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service), after the summons should be served on him, if such summons should be made within the county of Arapahoe, otherwise within forty days from the day of service.

On August 27, 1895, the deputy marshal made return of said writ as served that day on the defendant at Denver, county of Arapahoe.

Within ten days after the service of said summons, to wit, on the 4th day of September, 1895, the defendant, by his attorneys, specially appeared and moved the court to quash the summons for the following reasons:

“First. Said summons is not such a summons as is provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons, instead of thirty days, as provided by the statutes of Colorado.

“Second. The copy of said summons served upon said defendant is not certified to as a true copy by the clerk of this honorable court.”

Thereafter, to wit, on the 4th day of January, 1896, the court, after hearing argument of counsel, overruled said motion, and the defendant electing to stand by said motion, rendered judgment in favor of the plaintiff and against the defendant, according to the prayer of the complaint.

A bill of exceptions was signed and a writ of error allowed to the supreme court of the United States. * * * Mr. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court:

The case then, being properly before us, we must next consider whether the court below erred in assuming and exercising jurisdiction in the cause by rendering a final judgment against the defendant.

It is contended that the defendant had not been brought within the jurisdiction of the court by a proper writ of

summons, and that the defendant, having duly asserted an objection, the judgment entered is void.

It is not denied that the writ in question was in conformity with the existing rule of the district court of the United States, regulating the service of process, but it is claimed that the rule and proceedings thereunder are invalid because they did not conform to the provisions of the act of the general assembly of Colorado, providing a system of procedure in civil actions in the courts of justice of that state.

The proposition is based on the supposed meaning and effect of the Act of Congress of June 1, 1872, as found in Section 914 of the Revised Statutes, in the following terms: "The practice, pleadings and the forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This section is construed by the plaintiff in error as constituting a peremptory order or direction to the district and circuit courts to make their rules regulating the terms and service of their writs to strictly conform to the provisions of the state statutes regulating such matters.

Waiving any inquiry whether it is competent for a private party, duly served with process in pursuance of the directions of an existing general rule of a court of the United States, to bring into question the validity of such a rule, we think that upon a reasonable construction of Section 914 and of cognate sections, presently to be mentioned, the validity of the summons and judgment in the present case can be sustained. It is obvious that a strict and literal conformity by the United States courts to the state provisions regulating procedure is practically impossible, or, at least, not without overturning and disarranging the settled practice in the federal courts.

The state code of Colorado provides that civil actions shall be commenced by the issuing of a summons or the filing of a complaint; that the summons may be issued by the clerk of the court or by the plaintiff's attorney; it may be signed by the

plaintiff's attorney; it may be served by a private person not a party to the suit. All writs and processes issuing from a federal court must be under the seal of the court and signed by the clerk, and bear *teste* of the judge of the court from which they issue. Section 911, Revised Statutes. The processes and writs must be served by the marshal or by his regularly appointed deputies. Sections 787 and 788, Revised Statutes.

The very section (914) relied on by the plaintiff in error, takes notice of the impossibility of an entire adoption of state modes of proceeding by providing that conformity is only required "as near as may be." * * * (Court here quotes R. S. U. S. Sections 915, 916, 918 and proceeds:)

We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice, as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

In *Nudd v. Burrows*, 91 U. S. 426, it was sought to interpret the Act of June 1, 1872 (Section 914 Revised Statutes), as bringing the federal judges, when charging a jury in Illinois within the practice act of that state, directing that the court, in charging the jury, shall instruct them only as to the law of the case, and give no instructions unless reduced to writing. But this court held that the statute was not intended to have such an application, and that the course of the court, in charging juries, was not within the act.

In *Indianapolis & St. Louis Railroad v. Horst*, 93 U. S. 291, a similar view was taken, and it was held that, in respect to submitting interrogatories to the jury and to entertaining motions for a new trial, the circuit court of the United States was not, by reason of the provisions of the Act of June 1, 1872, constrained to follow a state law regulating those matters; and it was said: "The conformity is required to be 'as near as may

be'—not as near as may be possible, or as near as may be practicable." This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provision in such state statute which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.

To the same effect in *In re Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, where it was held that the practice and rules of the state court do not apply to proceedings taken in a circuit court of the United States for the purpose of reviewing in this court a judgment of such circuit court; and that such rules and practice, embracing the preparation, perfection, settling and signing of a bill of exceptions, are not within the "practice, pleadings and forms and modes of proceeding" which are required by Section 914 of the Revised Statutes to conform "as near as may be" to those existing at the time in like causes in the courts of record of the state.

In *Southern Pacific Company v. Denton*, 146 U. S. 202, the subject and the cases were reviewed at some length, and it was held that a statute of a state, which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of nonresidence, is not applicable to actions in a circuit court of the United States, held within the state, under Revised Statutes, Section 914. *Luxton v. North River Bridge Co.*, 147 U. S. 337; *Lincoln v. Power*, 151 U. S. 436.

The general rule, under which was issued the summons by which the plaintiff in error was brought into court, was adopted by the district court of the United States for the district of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, have been since enacted, but the district court has not seen fit to alter its rules, from time to time, in subserviency to such changes. We have a right to presume

that the discretion of the district court was legitimately exercised in both adopting and maintaining the rule in question; and its judgment is accordingly *affirmed*.

See notes on the subject in *O'Connell v. Reed*, 5 C. C. A. 586; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 390.

In *Nudd v. Burrows*, 91 U. S. 426, it is said, at page 441, concerning R. S. U. S., Section 914: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its origin in the code enactments of many of the states. While in the federal tribunals the common law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provisions in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction. * * *

"A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in 'the practice, pleadings, and forms and modes of proceeding.' The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

"There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them. *Houston v. Williams*, 13 Cal. 24.

In *Hein v. Westinghouse Air Brake Co.*, 168 Fed. 766, it is said, at p. 769: "Under the statute and decisions the following rules may be stated: The conformity act (Rev. St., Sec. 914 [U. S. Comp. St. 1901, p. 684]) provides that in cases at law the practice, pleadings and forms shall conform, as near as may be, to the practice, pleadings and forms in like causes in the state courts. (1) The practice must conform, except as to matters covered by congressional legislation, matters of jurisdiction, substituted service of process, charging juries, other matters relating to the personal administration of the judge, joinder of legal and equitable remedies, actions *in rem*, etc. (2) The federal courts may by standing

rule, change subordinate provisions which they deem unsuited to their procedure. (3) In their discretion they may reject collateral or subordinate provisions of the state practice, pleadings or forms, which tend to obstruct the administration of justice. This they may do in a particular case, presenting unusual features, without making any standing rule. They can not reject the local system as a whole, or in any substantial part; but they may dispense with matters of technical form, not affecting substantial rights or operating to the prejudice of a party. They can not change the local system designed to produce an issue of law or fact (*Railroad v. Horst*, 93 U. S. 291, 23 L. Ed. 898); but they are not bound to slavishly follow subordinate technical requirements of form, when justice will be subserved by departing from them.”

e. In bankruptcy matters.

CLAFLIN v. HOUSEMAN.

Reported in 93 U. S. 130.

See above p. 53.

Sturges v. Crowninshield, 4 Wh. 122; *Ogden v. Saunders*, 12 Wh. 213.
See Judicial Code, Section 256.

f. In probate matters.

WATERMAN v. CANAL BANK.

Reported in 215 U. S. 33.

(1909.)

DAY, Justice: * * * From an early period in the history of this court cases have arisen requiring a consideration and determination of the jurisdiction of the courts of the United States to entertain suits against administrators and executors for the purpose of establishing claims against estates, and to have a determination of the rights of persons claiming an interest therein. And this court has had occasion to consider how far the jurisdiction in equity of the courts of the United States in such matters may be affected by the statutes of the states providing for courts of probate for the establishment of wills and the settlement of estates. We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived

from the federal constitution and statutes, that in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the federal courts, which is like unto the high court of chancery in England at the time of the adoption of the Judiciary Act of 1789, the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has uniformly maintained the right of federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them. In various forms these principles have been asserted in the following, among other cases: *Suydam v. Broadnax*, 14 Pet. 67; *Hyde, et al., v. Stone*, 20 How. 170, 175; *Green's Ad. v. Creighton, et al.*, 23 How 90; *Payne v. Hook*, 7 Wall. 425; *Lawrence v. Nelson*, 143 U. S. 215; *Hayes v. Pratt*, 147 U. S. 557, 570; *Byers v. McAuley*, 149 U. S. 608; *Ingersoll v. Coram*, 211 U. S. 335.

The rule stated in many cases in this court affirms the jurisdiction of the federal courts to give relief of the nature stated, notwithstanding the statutes of the state undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates. This rule is subject to certain qualifications, which we may now notice. The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, can not seize and control the property which is in the possession of the state court. In *Byers v. McAuley, supra*, the rule was thus tersely stated by Mr. Justice Brewer, delivering the opinion of the court:

“A citizen of another state may establish a debt against the estate. *Yonley v. Lavender*, 21 Wall. 276; *Hess v. Reynolds*, 113 U. S. 73. But the debt thus established must take its place and share of the estate as administered by the probate court; and it can not be enforced by process directly against the property of the decedent. *Yonley v. Lavender, supra*. In like manner a distributee, citizen of another state, may

establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (*Payne v. Hook*, 7 Wall. 425); or against any other parties subject to liability (*Borer v. Chapman*, 119 U. S. 587), or in other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)”

In a late case, where the subject was given consideration in this court (*Farrell v. O'Brien*, 199 U. S. 89), while the rule of the earlier cases was stated and their binding force admitted, it was laid down that the circuit court of the United States could not entertain jurisdiction of a bill to set aside the probate of a will in the state of Washington, because by the statutes of that state the proceeding was one purely *in rem* and not a suit *inter partes*, sustainable in a court of equity. That case recognized what previous cases had held, that in proceedings purely of a probate character there was no jurisdiction in the federal courts. This was in harmony with the rule theretofore laid down in *Byers v. McAuley*, *supra*, in which it was held that the federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a circuit court of the United States could entertain jurisdiction in favor of citizens of other states to determine and award by decrees binding in *personam* their shares in the estates.

In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court can not be interfered with by the decree of the federal court. Still, we think there is an aspect of this case within the

federal jurisdiction, and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer a court of equity will shape its decree according to the equity of the case. *Walden v. Bodley*, 14 Pet. 156, 164.

The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

This controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this court, and such jurisdiction can not be limited or in anywise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the state.

The United States circuit court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted can not interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it can not interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to

be held in trust for her, thus binding the executor personally, as was the case in *Payne v. Hook*, 7 Wall. 425, *supra*, and *Ingersoll v. Coram*, 211 U. S. 335, *supra*.

g. In postal matters.

LEWIS PUBLISHING CO. v. WYMAN,

Reported in 152 Federal R. 200.

(1907.)

TRIEBER, District Judge: This action was originally commenced in the circuit court of the city of St. Louis, state of Missouri, and on petition of the defendants removed to this court. Defendants demurred to the jurisdiction of the state court, claiming that that court was wholly without jurisdiction to entertain the bill, the national courts having exclusive original jurisdiction of all controversies involving the actions of the executive department in postal matters.

The bill filed in the state court, in so far as it affects the jurisdictional question, may be briefly stated as follows: The complainant is the publisher of a monthly magazine which had theretofore, in conformity with the acts of congress and the rules and regulations of the post office department, been admitted to be sent through the mails at second-class rates; that it has a circulation exceeding 1,000,000 copies, and that the privilege of sending the magazine at these rates is a very valuable one; that on March 4, 1907, the postmaster general, without any hearing or notice to complainant and in violation of the Act of Congress approved March 3, 1901, Ch. 851, 1, 31 Stat. 1107 (U. S. Comp. St. 1901, p. 2655), annulled this privilege, and the defendant, the postmaster at St. Louis, where said publication is mailed, has notified complainant that, in conformity with the order of the postmaster general, the second-class privilege of complainant for his said magazine has been revoked, and that it will have to be sent as third-class matter, which will cause an increase in the postage to complainant of probably \$20,000 a month, and practically destroy its business and cause irreparable damage. The prayer of the bill is for an injunction to prevent the enforcement of this order of the postmaster general by the defendants, the postmaster and assistant postmaster at St. Louis.

The complainant also filed a motion to remand the cause to the state court, upon the ground that the action was not removable to this court. The fact that the defendants who now demur to the jurisdiction caused the removal of the cause to this court does not estop them from questioning the jurisdiction of the court from which it was removed. *Cowley v. Northern Pacific R. R. Co.*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Tootle v. Coleman*, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120.

Are the courts of the states without jurisdiction to grant relief to a citizen who claims that, by reason of some action of an official of the post office department, he has been greatly injured? Or, in other words, have the national courts exclusive jurisdiction of cases of that nature? In the view which this court takes it is unnecessary to determine whether an action of this nature may be maintained under Section 3833, Rev. St. (U. S. Comp. St. 1901, p. 2610), or whether *Teal v. Felton*, 12 How. 284, 13 L. Ed. 990, is applicable. The law is well settled that the courts of the United States inferior to the supreme court are mere creatures of congress, and possess no powers except those specifically granted to them by an act of congress, and this limitation applies to all causes which, under the constitution, congress might have granted to the national courts jurisdiction to hear and determine.

Prior to the adoption of the constitution no one will deny that the courts of the states had complete jurisdiction over all legal questions capable of judicial determination. Article 3 of the constitution defines the powers which congress may confer on the national courts. In the first Judiciary Act, that of September 24, 1789, Ch. 20, 1 Stat. 73, the act creating the national courts inferior to the supreme court and which, but for the acts of congress, would not exist, the jurisdiction of the circuit courts in civil actions was limited to cases in which the United States were plaintiffs or petitioners and actions depending entirely on a diversity of citizenship. The first act conferring upon the courts of the United States original jurisdiction in cases other than that of diversity of citizenship was the second

act creating the bank of the United States, April 10, 1816, Ch. 44, 3 Stat. 266. Since then several other special acts conferring jurisdiction on the national courts in cases in which a federal question is involved have been passed—the Act of February 25, 1863, Ch. 58, 12 Stat. 665, providing for the establishment of national banks, and the Act of July 27, 1868, Ch. 255, 2, 15 Stat. 226, authorizing corporations created by acts of congress to remove causes from the state to the national courts, but the first general act which extended the jurisdiction of the national courts to cases involving a federal question was the Judiciary Act of March 3, 1875, Ch. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508). Prior thereto the state courts had exclusive jurisdiction of causes of that nature, subject to review by the supreme court of the United States, under Section 25 of the Judiciary Act of September 24, 1789. * * *

It was also contended on behalf of the defense that, in view of the fact that actions of this nature are an interference with the proper discharge of the duties imposed upon one of the executive departments of the national government in pursuance of the constitution, the wheels of the government may be stopped by improper injunctions granted by state courts all over the country, if permitted. It would be a sufficient answer to this contention, that there is no reason to presume that the courts of the states will pervert the laws of the nation any more than would the national courts, and that congress is of that opinion is conclusively evidenced by the fact that it has not seen proper to deprive the state courts of that jurisdiction by conferring exclusive jurisdiction on the courts of its own creation in cases of this nature, or even cases arising under the revenue laws. The reports of the supreme court of the United States are full of cases which were originally instituted against collectors of customs and internal revenue in the state courts and removed to the national courts, and in none of them has that high tribunal ever held that the state court in which the suit was originally instituted was without jurisdiction. In view of the well-known fact that the courts of the United States, including the supreme court, will raise jurisdictional questions of their own motion, as was evidenced in *Minnesota v. Northern Securities Company*,

194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, and *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, it is hardly reasonable to suppose that so important a question would have been overlooked. In the very important cases of *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, and *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, which were actions arising under the revenue laws of congress against the collector of customs, the suits were originally instituted in the state courts and removed, under the provisions of Section 643, Revised Statutes, to the national court.

From what has been said it follows as of course that the demurrer of defendants challenging the jurisdiction of the state court must be overruled, and as the bill of complaint on its face shows that complainant claims some right granted to him by the constitution and laws of the United States and the value of the matter in controversy exceeds \$2,000, the motion to remand the cause to the state court must also be overruled. *New Orleans National Bank v. Merchant* (C. C.), 18 Fed. 841.

Teal v. Felton, 12 How. 284, 292, where right to sue postmaster in state court in trover for refusal to deliver mail to addressee was upheld in the federal court.

8. TERRITORIAL JURISDICTION.

a. Process runs in district.

TOLAND v. SPRAGUE.

Reported in 12 Peters, 300.
(1838.)

BARBOUR, Justice, delivered the opinion of the court: This is a writ of error to a judgment of the circuit court of the United States for the district of Pennsylvania. The suit was commenced by the plaintiff in error, against the defendant in error, by a process known in Pennsylvania by the name of a foreign attachment, by which, according to the laws of that state, a debtor who is not an inhabitant of the commonwealth, is liable to be attached by his property found therein, to appear and answer a suit brought against him by a creditor. It appears upon the record that the plaintiff is a citizen of Pennsylvania,

and the defendant, a citizen of Massachusetts, but domiciled, at the time of the institution of the suit, and for some years before, without the limits of the United States, to wit, at Gibraltar; and when the attachment was levied upon his property, not being found within the district of Pennsylvania. Upon the return of the attachment, executed on certain garnishees holding property of, or being indebted to, the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court; after which the defendant appeared and pleaded. Issues were made up between the parties, on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial a bill of exceptions was taken by the plaintiff, stating the evidence at large, and the charge given by the court to the jury, which will hereafter be particularly noticed when we come to consider the merits of the case.

But before we do so, there are some preliminary questions arising in the case which it is proper for us to dispose of.

And the first is, whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him? The answer to this question must be found in the construction of the eleventh section of the Judiciary Act of 1789, as influenced by the true principles of interpretation, and by the course of legislation on the subject. That section, so far as relates to this question, gives to the circuit courts original cognizance, concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It then provides that no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and moreover, that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which

he will be found at the time of serving the writ. As it respects persons who are inhabitants, or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is, in giving a construction to the section in relation to those who are *not* inhabitant and *not* found in the district.

This question was elaborately argued by the circuit court of Massachusetts, in the case of *Picquet v. Suran*, reported in 5 Mason, 35. Referring to the reasoning in that case, generally, as having great force, we shall content ourselves with stating the substance of it, in a condensed form, in which we concur. Although the Process Acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of congress. The state laws can confer no authority on this court, in the exercise of its jurisdiction, by the use of state process, to reach either persons or property, which it could not reach within the meaning of the law creating it. The Judiciary Act has divided the United States into judicial districts; within these districts a circuit court is required to be holden; the circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union; it has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state, and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court can not be served without the district in which it is established without the special authority of law therefor.

HERNDON v. RIDGWAY.

Reported in 17 Howard, 424.

(1854.)

THIS was an appeal from the district court of the United States for the northern district of Mississippi.

It was a bill filed by Herndon, under the circumstances stated in the opinion of the court, and which was dismissed by the court below.

The process against Davis was served upon Messrs. Dowd and Murphy, his attorneys. A motion was made to dismiss the bill for three reasons, the second of which was:

“Because Henry Davis is not a citizen of the northern district of Mississippi and Dowd and Murphy are not his attorneys of record in any of the courts of the United States, and have not instituted proceedings or suit therein against said Herndon, but are attorneys of record of said Davis, in the circuit court of Monroe county, Mississippi, a state court, as per affidavit on file.” The affidavit was as follows:

“In open court personally appeared Wm. F. Dowd, one of the firm of Dowd and Murphy, who made oath that Dowd and Murphy are not the attorneys of record of Henry Davis, and have not been, as such, to institute any suit in this court, or any one of the federal courts of the United States, against Edward Herndon, for the recovery of the property mentioned in the bill filed in this cause; but they, said Dowd and Murphy, are the attorneys of record of Henry Davis to prosecute a suit against said Herndon, in a state court, to wit: the circuit court of Monroe county, in the state of Mississippi.

“W. F. Dowd.”

The district court dismissed the bill, and Herndon appealed to this court.

The case was argued by Mr. Adams, for the appellant, who contended that service upon the attorneys was sufficient; and by Mr. Phillips, for the appellees, who contended that it was not, and referred to 3 Bro. Ch. 521; 2 Cox Ch. 389.

MR. JUSTICE CAMPBELL delivered the opinion of the court:

The plaintiff complains that, in 1849, he purchased from James C. Ridgway a number of slaves, for whom he gave his bond to the vendor; that this was transferred to E. T. Ridgway

for the use of Wm. H. Gasque, and that a suit is pending in the district court of the United States for that district, to collect the sum due; that the slaves are in the possession of Wm. P. Givan, to whom he sold them with a warranty of the title; that one Davis claims the slaves under a title paramount to that derived from Ridgway, and had brought a suit for them in the state court, which had proved ineffective, and now threatens to renew it. The object of the bill is to require the two Ridgways and Gasque, on the one part, and Davis, on the other, to interplead in the district court of the United States, to settle their right to the slaves, so that he may pay the purchase-money to the proper person. He alleges that the vendor, Ridgway, is insolvent.

The four defendants are citizens of Alabama. Notice of the motion for injunction was served on the attorneys for the plaintiff, in the suit in the district court, and upon the attorneys who prosecuted the suit against Givan for Davis in the state court. The attorneys for Davis disclaim any connection with him in this controversy, and move to dismiss the bill for want of jurisdiction. Gasque appears and demurs to the bill for the same cause, and no notice or appearance exists in the record for the vendor, Ridgway. The district court retained the bill twelve months, and then dismissed it on these motions.

The jurisdiction of the district court over parties is acquired only by a service of process, or their voluntary appearance. It has no authority to issue process to another state. In the present case the absent defendants decline to appear, and process can not be served, so that the court is without any jurisdiction over the essential parties to the bill. There was no course open to it except to dismiss it for the want of jurisdiction, upon the motion submitted for that object. *Toland v. Sprague*, 12 Pet. 300.

There is no error in the record, and the decree is affirmed.

Barrett v. United States (No. 1), 169 U. S. 218 (1897), contains a historical review of the legislation creating the federal districts.

That the process of the circuit court can not run beyond the district, see *United States v. American Lumber Co.*, 85 Fed. 827.

b. Enforcing foreign judgment.

See *Hilton v. Guyot*, 159 U. S. 113, in which the court (Justice Gray) discusses at great length the enforcement of rules of international law,

judicial comity between nations, and specifically the enforceability of a judgment decreed by a court of France against American citizens.

c. Crimes.

Rosencrans v. United States, 165 U. S. 257, decides that there is jurisdiction to try in one district an indictment found in another district.

CRIMINAL JURISDICTION: There are no common law crimes against the United States. The Criminal Code of the United States was enacted on March 4, 1909, see 35 Stat. L. 1088, and with some amendments is in force at the present time.

For criminal jurisdiction in general of the United States courts, see Judicial Code, Section 256, and Criminal Code, Sections 272, 282.

United States v. Rodgers, 150 U. S. 249, on criminal jurisdiction of United States, term "high seas" in R. S. U. S., 5346 (1878), and in present Criminal Code, 272, includes open, unenclosed waters of the Great Lakes.

Wayne v. United States, 217 U. S. 234, the words in R. S. U. S., 5339, "out of the jurisdiction of any particular state," mean *State* of the Union. (Here a harbor of Hawaii.)

In *Ex parte O'Hare*, 179 U. S. 662, it is decided that the term "haven," in Rev. Stat. U. S., Sections 5346, 5361, 5362, includes the waters inclosed between the shore and the government breakwater in Lake Erie at Buffalo.

For the jurisdiction of the United States commissioner, see *United States v. Allred*, 155 U. S. 591.

9. CONTEMPT.

The federal courts have inherent power to punish contempt, see *United States v. Debs*, 64 Fed. 724; *In re Debs*, 158 U. S. 564; *United States v. Shipp*, 203 U. S. 563, 214 U. S. 386; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, distinguishing criminal and civil contempt.

Review of judicial history of contempt of court is found in *Elliott v. Hovey*, 167 U. S. 409.

Neither error nor appeal will lie against a judgment in contempt, but the remedy where court was without jurisdiction is the writ of *habeas corpus*. *Ex parte Fisk*, 113 U. S. 713; *In re Ayres*, 123 U. S. 443.

10. WRITS.

See Judicial Code, 1911, Section 262.

a. Mandamus.

EX PARTE BRADSTREET.

Reported in 7 Peters, 634, at page 648.

(1833.)

THE following mandamus was issued by order of the court. United States of America, ss. To the Honorable Alfred Conklin,

judge of the district court of the United States for the northern district of New York, greeting: Whereas, one Martha Bradstreet hath heretofore commenced and prosecuted, in your court, several certain real actions, or writs of right, in your court lately pending between the said Martha Bradstreet, demandant, and the following named tenants severally and respectively, to wit: Apollos Cooper and others (naming them). And whereas, heretofore, to wit, at a session of the supreme court of the United States, held at Washington, on the second Monday of January, in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court, upon the several motions of the tenants aforesaid, were dismissed, for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant in the several counts filed and exhibited by the said demandant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of demandant; whereupon the said supreme court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said supreme court should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right aforesaid, and the *mises* therein joined. And whereas, at the late session of the said supreme court, held at Washington, on the second Monday of January, in the year 1833, you certified and returned to the said supreme court, together with the said rule, that after the *mises* had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be dismissed, upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not, therefore, appear by the pleadings that the causes were within the jurisdiction of the court; that, in conformity with what appeared to have been the uniform language

of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the circuit court for the third circuit (see 4 W. C. C. 482, 624), you granted their motions; and assuming that the causes were rightly dismissed, it follows, of course, that you ought not to be required to reinstate them, unless leave ought also to be granted to the demandant to amend her counts: And whereas, afterwards, to wit, at the same session of the said supreme court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rules being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the arguments of counsel, as well on your behalf, showing cause as aforesaid, as on behalf of the demandant, in support of the said rule, it was considered by the said supreme court, that you had certified and returned to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said supreme court being of opinion, and having determined and adjudged upon the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the said supreme court, and of the courts of the United States, is to allow the value to be given in evidence; that, in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence in the said supreme court; consequently, that she can not be legally prevented from bringing her cases before the said supreme court; and it was also then and there considered by the said supreme court, that the peremptory writ of the United States issue, requiring and commanding you, the said judge of the said district court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the *mises* therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid: Therefore,

you are hereby commanded and enjoined, that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge according to the law and right of the case, the several writs of right and the *mises* therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants hereinabove named, so that complaint be not again made to the said supreme court; and that you certify perfect obedience and due execution of this writ to the said supreme court, to be held on the first Monday in August next. Hereof, fail not, at your peril, and have then and there this writ.

Witness the honorable John Marshall, the chief justice of said supreme court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

W. T. CARROLL,

Clerk of the Supreme Court of the United States.

McINTIRE v. WOOD.

Reported in 7 Cranch, 504.

(March 15, 1813.)

JOHNSON, J., delivered the opinion of the court as follows: I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the circuit court of Ohio upon a motion for a mandamus to the register of the land office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff for lands to which he supposed himself entitled under the laws of the United States.

This court is of opinion that the circuit court did not possess the power to issue the mandamus moved for. Independent of the particular objections which this case presents, from its involving a question of freehold, we are of opinion that the power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the eleventh section of the Judiciary Act covered the whole ground of the constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the fourteenth section of the same act would sanction the

issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court and this provision the legislature has thought sufficient at present, for all the political purposes intended to be answered by the clause of the constitution which relates to this subject.

Riggs v. Johnson County, reported in 6 Wall. 166. See above, p. 62.

That a proceeding for a mandamus is not a civil suit, and that mandamus is an ancillary proceeding, see *Rosenbaum v. Bauer*, 120 U. S. 450, and *In re Glaser*, 198 U. S. 171.

That the federal supreme court has only such original jurisdiction as is prescribed in the constitution, and therefore can not issue a writ of mandamus commanding the secretary of state to issue a commission of office, although a statute purports to confer such authority, see *Marbury v. Madison*, 1 Cr. 137, at pp. 173 to 180.

In *Ex parte Bradley*, 7 Wall. 364, at page 376, it is said: "This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right, without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counsellor, disbarred from caprice, prejudice or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon the contrary doctrine contended for, would be utterly remediless."

See *Ex parte Harding*, 219 U. S. 363 (1910), to the effect that a writ of mandamus will not issue from the supreme court to require a district court to remand a cause to the state court, discussing and distinguishing the earlier cases.

b. Ne exeat.

IN RE COHEN.

Reported in 136 Federal Rep. 999.
(1905.)

HUMPHREY, District Judge (after making above statement): This is an application by creditors for an order for a writ in the nature of a writ of *ne exeat* to restrain the alleged bankrupt from departing the jurisdiction of the court. The respondent had been previously arrested and examined before the court, as provided for in Section 9b of the Bankrupt Act of July 1, 1898, Ch. 541, 30 Stat. L. 549 (U. S. Comp. Statutes, 1901, p. 3426) and the ten days' time limit fixed in Section 9b being about to expire, this application is urged under the authority of Section 2, Subdivision 15, of the bankrupt law, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), and Sections 716, 717, Rev. St. (U. S. Comp. St. 1901, p. 580).

I am of opinion that the facts are amply sufficient to justify the issuance of the writ, if the court has the power. It is objected by respondent that the court is without power to order the writ of *ne exeat*, except upon the satisfactory proof that the respondent is about to depart from the United States; that it would be an unwarranted and arbitrary exercise of power to restrain the respondent from departing out of the jurisdiction of this court, and that no reasonable construction of any federal statute can be held to give such power. Counsel for respondent argue that if the court can confine respondent to the southern district of Illinois it can confine him to any county thereof, or to any smaller range of territory, and, if so, to any building, and that this would amount to imprisonment for debt. Unless it be found in the statute, the court has not the power. It is a familiar rule that statutes are to be so construed as fairly and reasonably to carry out the purposes of the legislative body. A study of the bankrupt law shows that the purposes of congress in its enactment were: First, to allow honest bankrupts to be relieved of their debts by surrendering their property for the benefit of creditors; and, second, to compel dishonest bankrupts to surrender their property for the benefit of creditors. In elaborate detail the act specifies the methods by which the bankrupt may himself

carry out the first-named purpose, and also the method by which the creditors applying through the judicial arm of the government may carry out the last-named purpose. Congress contemplated that in many instances skillful men would seek to evade the law, and the act gives the court unusual powers to enforce compliance. Section 2 defines the powers of a court of bankruptcy. In nineteen subdivisions it enumerates in detail the necessary judicial powers which the legislative body could anticipate, and, although the court is thus specifically clothed with these numerous powers, subdivision 15 is inserted, in the following words: "Make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." Here is a sweeping general delegation of power, evidently intended to supply any omission occurring in the various other subdivisions of the section so far as congress could legally do so. It is clear that congress intended by this language to give the court every necessary power. It could not give the power to legislate, or to extend the provisions of the act. No power can be exercised which does not clearly reside in the act. But congress intended to give, and, in my judgment, the above quoted language does give, every judicial power known to the law which the court may find necessary for the proper enforcement of the bankrupt act. Is the writ here applied for a judicial power known to the law? Certainly the writ of *ne exeat* is a judicial power known to the law. If this application conformed strictly to the provisions of Section 717, Rev. St., and asked that the respondent be restrained from departing the United States, counsel say they would not object to it; that it would then be quite within the power of the court. Section 716, Rev. St., is intended to give and does give the courts powers in addition to those specifically defined in 717, and other statutes. It gives the power to issue any necessary writ "agreeable to the usages and principles of law." The writ provided for in Section 717 is of time honored usage. Originally it was based upon the principle that the law might require a party to be restrained within the king's realm. Surely it is equally in accordance with the principles of law

that the court may for proper cause restrain a party within such territory that the hand of the court may without embarrassment be laid upon him when he is wanted. I think this power is clearly given by Section 716, Rev. St., as one of the equity powers of a bankruptcy court, and, if there could be any doubt on that subject, it is removed by the enactment of Section 2, Subdivision 15, of the bankrupt law. *Lewis v. Shainwald* (C. C.) 48 Fed. 500; *In re Lipke* (D. C.) 98 Fed. 970.

The writ will issue, and bond is fixed in the sum of \$20,000. Upon failure to give bond respondent will be kept in custody by the marshal at the expense of the petitioners, and he will not be imprisoned.

This writ is illustrated in *Griswold v. Hazard*, reported in 141 U. S. 260, at p. 263: "Whereas it is represented to our supreme court, sitting in equity, on the part of Isaac P. Hazard and others, complainants, against Thomas C. Durant and others, defendants, that said Thomas C. Durant is greatly indebted to the said complainants, and designs quickly to go into other parts beyond this state (as by oath made in that behalf appears), which tends to the great prejudice and damage of the said complainants: Therefore, in order to prevent this injustice, we hereby command you that you do, without delay, cause the said Thomas C. Durant to come before you and give sufficient bail or security, in the sum of fifty-three thousand seven hundred and thirty-five dollars, that he, said Thomas C. Durant, will not go or attempt to go into parts beyond this state without the leave of our said court; and in case the said Thomas C. Durant shall refuse to give such bail or security, then you are to commit him, the said Durant, to our county jail, in your precinct, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security you are forthwith to make and return a certificate thereof to our said court, distinctly and plainly, under your hand, together with this writ."

c. Prohibition.

That a federal court can grant a writ of prohibition only in a case properly within its original or appellate jurisdiction, see *In re Massachusetts*, 197 U. S. 482.

For a historical account of this writ, see article in New York Tribune of January 19, 1891, by Professor Theodore W. Dwight, reprinted in a note to Section 362 of the fourth edition of Foster's Federal Practice.

That the supreme court may direct a writ of prohibition to the district court in admiralty, see *In re Cooper*, 138 U. S. 404; and for a further discussion of the writ, see S. C., 143 U. S. 472.

d. Scire facias.**LAFAYETTE COUNTY v. WONDERLY.**

Reported in 92 Federal, 313.

(1899.)

IN error to the circuit court of the United States for the Western District of Missouri.

The writ of error in this case challenges a judgment of revivor (77 Fed. 665), upon a writ of *scire facias* on a judgment against the county of Lafayette, in the state of Missouri, rendered on October 31, 1885. The writ was issued on October 25, 1895. It was in the usual form. It recited the judgment of 1885; the fact that it had been assigned to Charles P. Wonderly, the defendant in error; that it was suggested that this judgment had never been satisfied; that the defendant in error had asked that the judgment be revived; and it summoned the county to appear and show cause why this request should not be granted. The county made numerous objections to the relief sought by demurrer and by answer, only four of which are insisted upon in this court. They are that the judgment of 1885 could not be lawfully revived by means of the *scire facias*: (1) Because no execution was issuable upon it; (2) because it was not a lien upon any property of the judgment debtor; (3) because the judgment of 1885 was barred on October 31, 1895, by the act of the legislature of Missouri of April 9, 1895 (Laws 1895, p. 221); and (4) because it was merged into a judgment against the county which was rendered prior to the judgment of revivor herein, in the circuit court of Lafayette county, in the state of Missouri, in an action which had been brought in that court by the defendant in error upon the same judgment on September 18, 1895.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

SANBORN, Circuit Judge: The proceeding by writ of *scire facias* to revive a personal judgment is statutory. It had its origin in the statute of Westminster II (12 Edw. I. Ch. 45). It is not an original proceeding, but a mere continuance of the former suit—a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment. *Adams v. Savage*, 3 Salk. 321, 2 Bac. Abr. 598; *McGill v. Perrigo*, 9

Johns. 259; *Humphreys v. Lundy*, 37 Mo. 320, 323. Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he can not, to avoid the statute of limitations against the judgment and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment, and any lien which it evidences, as of the date of the judgment of revival. 2 Cooley, Bl. Comm. 656; *Walsh v. Boose*, 16 Mo. App. 231, 233; *Insurance Co. v. Hill*, 17 Mo. App. 591, 593; *Fagan v. Bently*, 32 Ga. 534; *Farrell v. Gleeson*, 11 Clark & F. 702, 712. It is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself, regardless of such an action. Until payment of the debt has been enforced, he may prosecute his action of debt and his proceeding by *scire facias* at the same time, and the pendency of the one is no defense to the other.

For definition of *scire facias*, see *Winder v. Caldwell*, 14 How. 434, at p. 443: "A *scire facias* is a judicial writ used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ or writ of execution, it is so far an original that the defendant may plead to it, as it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ."

e. Habeas corpus.

EX PARTE VIRGINIA.

Reported in 100 U. S. 339.

(1879.)

PETITION for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

MR. JUSTICE STRONG delivered the opinion of the court: The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the district court of the United States for the western district of Virginia. The indictment alleged that he, being a judge of the county

court of Pittsylvania county of that state, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the district court, in order that he may be discharged; and he avers that the district court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offense punishable in said district court; and that the finding of said indictment, and his consequent arrest and imprisonment, are unwarranted by the constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the state of Virginia, whose judicial officer he is.

A similar petition has been presented by the state of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners? The question is not free from difficulty, in view of the constitution and the several acts of congress relating to writs of *habeas corpus*, and in view of our decisions heretofore made. If granting the writ would be an exercise of original jurisdiction, it would seem that it could not be granted, unless the fact that one of the petitioners for the writ is the state of Virginia makes the cases to differ. This is established by the

rulings in *Marbury v. Madison* (1 Cranch, 137), and in numerous subsequent decisions. And it is not readily perceived how the fact that a state applies for the writ to be directed to one of her own citizens can make a case for our original jurisdiction.

But the appellate power of this court is broader than its original, and generally—that is, in most cases—it may be said that the issue of a writ of *habeas corpus* by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the constitution to any particular form or mode. It is not alone by appeal or by writ of error that it may be invoked. In the matter of *Metzer* (5 How. 176), it was indeed ruled that an order of commitment made by a district judge, at chambers, can not be revised here by *habeas corpus*. But such an order was reviewable in no form; and, besides, the authority of that case has been much shaken. *In re Kaine*, 14 How. 103; *Ex parte Yerger*, 8 Wall. 85. In the latter of these cases, it was said by Chief Justice Chase, in delivering the opinion of the court: “We regard as established, upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by congress.”

In the present case, the petitioner Coles is in custody under a bench warrant directed by the district court, and the averment is that the court had no jurisdiction of the indictment on which the warrant is founded.

The district court is an inferior court, and, in such a case as that exhibited by the indictment, its judgments are reviewable here. The indictment has been found for a violation of Section 4 of the Act of Congress of March 1, 1875, entitled “An Act to protect all citizens in their civil and legal rights.” 18 Stat. part 3, 336. The third section gives to the district courts as well as the circuit, judicial cognizance of all offenses against the provisions of the act; and the fifth section enacts that all cases arising under the provisions of the act shall be

reviewable by the supreme court of the United States, without regard to the sum in controversy, under the same provisions and regulations as now provided by law for the review of other cases in said court. If this section applies to criminal cases as well as civil, our appellate power extends directly to the district court, and the Act of March 3, 1879 (20 Stat. 354), which allows writs of error to the circuit court in such cases, has not deprived us of appellate jurisdiction.

We have, then, an application to our appellate power over the action of a district court, in a case where it is alleged that court has acted outside of its jurisdiction. It is said there is nothing to appeal from, that no decision or judgment has been given in the inferior court, and that the appeal, if any, is taken from the finding of a grand jury. This is a mistake. The bench warrant was an order of the court, and the validity of the bench warrant is the matter in question. It is true there has been no final judgment or decision of the whole case; but an appeal may lie, and in many courts often does lie, from a merely interlocutory order. It is said no *habeas corpus* was sued out either in the district or circuit court, and that we are not called upon to review the action of a lower court upon such a writ. This is true, and such a writ from the lower court would have been a more regular proceeding. We can not say, however, it was indispensable, especially in view of the fact that a state is seeking release of one of her officers, and in view of former action in this court. In *Ex parte Hamilton* (3 Dall. 17), this court awarded a writ of *habeas corpus*, to review a commitment under a warrant of a district judge. In *Ex parte Burford* (3 Cranch, 448), such a writ was awarded to review a commitment by the circuit court of the District of Columbia, not to review a decision of an inferior court upon a *habeas corpus* issued by it. So, in *Ex parte Jackson* (96 U. S. 727), in which the question of our power to issue the writ was raised, and the petition only averred that the circuit court had exceeded its jurisdiction, this court considered the merits of the case, without regard to the fact that there had been no *habeas corpus* in the court below. And in *Ex parte Lange* (18 Wall. 163), it was ruled, after an examination of authorities, that when a prisoner

shows that he is held under a judgment of a federal court, given without authority of law, this court, by writs of *habeas corpus* and *certiorari*, will look into the record, so far as to ascertain whether that is the fact, and, if it is found to be so, will discharge him. Mr. Justice Miller said, in delivering the opinion: "The authority of the court in such a case, under the constitution of the United States, and the fourteenth section of the Judiciary Act of 1789, to issue this writ and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question."

While, therefore, it is true that a writ of *habeas corpus* can not generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

Our conclusion, then, is that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case. * * *

RIGGINS v. UNITED STATES.

Reported in 199 U. S. 547.

(1905.)

RIGGINS and Powell were indicted under 5508, 5509, Revised Statutes, in the district court for the northern division of the northern district of Alabama, at the October term, 1904, thereof; and on the twenty-fourth day of October, 1904, the indictment was remitted to the next session of the circuit court in and for that division and district by order of the circuit court, the district judge presiding. A *capias* was issued to take Riggins into custody to answer the indictment, October 26, 1904. On the same day a severance was ordered as between Powell and Riggins, and thereupon Riggins filed his petition for *habeas corpus*; the writ was issued; the marshal made his return; the circuit court, held by the district judge, heard the case and discharged the writ and remanded Riggins to custody; a bill of exceptions was signed and sealed, and an

appeal to this court was prayed, allowed and perfected, by the giving of a bond in the penal sum of two hundred and fifty dollars, which was approved by the judge; certificate of certain questions of jurisdiction was filed; as also assignments of error; and a citation was issued and served; all on the said twenty-sixth day of October, 1904. The opinion of the district judge will be found reported 134 Fed. Rep. 404.

The petition for *habeas corpus* alleged that Riggins was restrained of his liberty by the United States marshal under the *capias* issued on the indictment, a copy of which *capias* was attached, as also a copy of the indictment. That indictment in brief set up that Riggins and others entered into a conspiracy to take one Maples, a citizen of the United States of African descent, from the state officers, to whose custody he had been lawfully committed under a charge of murder, and to hang him until he was dead, and that said conspiracy was formed and its purpose executed because Maples was of African descent. The petition averred that the indictment charged no offense punishable under the laws of the United States; that the indictment did not show that Riggins had violated any right, privilege or immunity guaranteed to Maples under the constitution of the United States; or that any federal law was violated providing for the punishment of such offense; and that it did not appear from the indictment that the conspiracy, combination or confederation therein alleged was formed or entered into under any law of the state of Alabama, or that any law of that state authorized its citizens or other persons to enter into any conspiracy to injure, threaten or oppress Maples by denying to him, by reason of his race, the right, privilege and immunity of a trial by jury to determine his guilt or innocence on an indictment for murder pending against him in the courts of Alabama.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court:

It is settled that the writ of *habeas corpus* will not issue unless the court under whose warrant petitioner is held is without jurisdiction, and that it can not be used merely to correct errors. Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet in rare and

exceptional cases it may be issued, although such remedy exists.

In *New York v. Eno*, 155 U. S. 89, it was held that congress intended to invest the courts of the Union and the justices and judges thereof with power upon writ of *habeas corpus* to restore to liberty any person within their respective jurisdictions held in custody, by whatever authority, in violation of the constitution or any law or treaty of the United States; that the statute contemplated that cases might arise when the power thus conferred should be exercised during the progress of proceedings instituted in a state court against the petitioner on account of the very matter presented for determination by the writ of *habeas corpus*; but that the statute did not imperatively require the circuit court by that writ to wrest the petitioner from the custody of the state officers in advance of his trial in the state court; and that while the circuit court had the power to do so, and could discharge the accused in advance of his trial, if restrained in violation of the constitution, it was not bound in every case to exercise such power immediately upon application being made for the writ. The conclusion was that in a proper exercise of discretion the circuit court should not discharge the petitioner until the state court had finally acted upon the case, when it could be determined whether the accused, if convicted, should be put to his writ of error or the question determined on *habeas corpus* whether he was restrained of his liberty in violation of the constitution of the United States.

These principles were fully discussed in the cases of the appeals of Royall from judgments in *habeas corpus* in the circuit court of the United States for the eastern district of Virginia, 117 U. S. 241. And in addition Royall made an original application to this court for a writ of *habeas corpus*, which was denied upon the grounds stated in the previous cases. 117 U. S. 254.

While special reasons may exist why this should be the rule in respect of proceedings in state courts, which are not applicable to cases in the courts of the United States, nevertheless we have frequently applied the same principle to such cases. *In re Chapman*, 156 U. S. 211; *In re Lancaster*, 137

U. S. 393; *In re Huntington*, 137 U. S. 63; *Ex parte Mirzan*, 119 U. S. 584.

In Chapman's case we held that it was a judicious and salutary general rule not to interfere with proceedings pending in the courts of the District of Columbia or in the circuit courts of the United States in advance of their final determination. And we said:

"We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. If judgment goes against petitioner and is affirmed by the court of appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. If, on the other hand, a writ of error does not lie to this court, and the supreme court of the district was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of *habeas corpus*. We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the district upon the merits of the case before them."

In *In re Lancaster*, this court denied an application for leave to file a petition for *habeas corpus* in the circumstances stated in the opinion, which opinion was as follows:

"The petitioners were indicted under Sections 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the circuit court for the southern district of Georgia, and have been taken into custody. They have not invoked the action of the circuit court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of *habeas corpus*, upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States, or cognizable in the circuit court, and that for other reasons the indictment can not be sustained. In this posture of the case we must decline to interfere."

We are of opinion that the rule therein laid down should have been followed by the circuit court.

True, the present case is not one of the issue of the writ of *habeas corpus* in respect of confinement under state authority, nor of an application to this court for the writ, but is the case of custody taken under a *capias* issued on an indictment returned in the district court and removed to the circuit court, and an application to that court for the writ before defendant had been compelled to take any step in the cause.

Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the circuit court it would have been, defendant would have pleaded and gone to trial, and might have been acquitted. If convicted, the remedy by writ of error was open to him.

There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obliged to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject.

If we should affirm or reverse the final order in this case, we should recognize a proceeding below, which we would not ourselves have entertained; and we are not disposed to hold that this manner of testing such questions as are argued here ought to have been pursued.

Final order reversed and cause remanded with a direction to the circuit court to quash the writ of habeas corpus and dismiss the petition without prejudice.

WHITNEY v. DICK.

Reported in 202 U. S. 132.

(1905.)

ON May 16, 1905, the respondent in these two cases was convicted in the district court of the United States for the district of Idaho, northern division, on the charge of unlawfully and feloniously introducing intoxicating liquors into

the Nez Perce Indian Reservation, and sentenced to pay a fine of \$100 and be confined in the penitentiary for the term of one year and ten days. On July 21, 1905, a bill of exceptions was duly prepared and signed. Thereafter, without suing out a writ of error, respondent applied to the circuit court of appeals of the ninth circuit for writs of *habeas corpus* and *certiorari*. It does not affirmatively appear that any writ of *habeas corpus* was issued, the record in the court of appeals reciting:

"The petition in the above entitled matter for a writ of *habeas corpus* and a writ of *certiorari* having been duly submitted to the court, and the petition for a writ of *certiorari* therein having been granted and a writ of *certiorari* having been issued, directed to the honorable the United States district court for the district of Idaho, and requiring the said district court to certify to this court a transcript of the record and proceedings in the suit therein of the *United States v. George Dick*, and the return to the said writ of *certiorari* having been filed, the matter was duly argued and submitted to the court for consideration and decision upon the said return and upon the briefs of counsel for the respective parties.

"On consideration whereof, and the court being of the opinion that the United States district court for the district of Idaho did not have jurisdiction of the offense charged in the indictment found against the petitioner in the suit of the *United States v. George Dick*, it is ordered and adjudged that the petitioner, George Dick, be discharged from imprisonment."

From this order of discharge, Whitney, as warden of the Idaho state penitentiary (the respondent named in the petition for a *habeas corpus*), perfected an appeal to this court, and that appeal is case No. 494. Subsequently he applied for a writ of *certiorari*, to review the decision of the court of appeals, which was allowed, and that is case No. 557. The record in case No. 494 was directed to stand as the return to the writ of *certiorari*. Both the appeal and the *certiorari* were taken by the warden, appearing by the United States attorney for the district of Idaho, under the direction of the attorney general of the United States.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court:

The first question is, of course, one of jurisdiction. Final orders of the circuit court of appeals may of right be brought to this court only where the matter in dispute exceeds in value one thousand dollars. As there is no amount in controversy, the appeal was unauthorized and must be dismissed. *Lau Ou Beo v. United States*, 144 U. S. 47, 58. But by *certiorari* the judgment of the court of appeals is properly before us. *In re Chetwood*, Petitioner, 165 U. S. 443, 462.

Had the court of appeals jurisdiction to issue separately either a writ of *certiorari* or one of *habeas corpus*, or the two jointly? And first, as to the writ of *habeas corpus*. Undoubtedly that writ is one of high privilege. We are not confronted with the case of a failure by congress to make any provision for it. Under Section 751, Rev. Stat., the supreme, circuit and district courts may issue writs of *habeas corpus*, and by Section 752 like power is given to the several justices and judges of said courts for the purpose of inquiry into the cause of restraint of liberty. Thus adequate provision has been made for securing to everyone entitled thereto the writ of *habeas corpus*. So when congress passes an act establishing a new court there is no constraining presumption that it must intend to give to that court jurisdiction in *habeas corpus*. The Court of Appeals Act (26 Stat. 826) does not in terms grant authority to issue the writ. It is silent on the subject, and in order to sustain we must write something into the statute which congress itself did not put there. In this we are speaking of the writ of *habeas corpus* as an original and independent proceeding, for by Section 12 of the act "The circuit court of appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States." Section 716 provides that "The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Cases may arise in which the writ of *habeas corpus* is necessary to the complete exercise

of the appellate jurisdiction vested in the circuit court of appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court. There was no proceeding of an appellate character pending in the court of appeals for the complete exercise of jurisdiction in which any auxiliary writ of *habeas corpus* was requisite. Appellate proceedings are, generally speaking, initiated by appeals and writs of error, and for these the Court of Appeals Act specifically provides. The writ of *habeas corpus* is not the equivalent of an appeal or writ of error. It is doubtless true that if the language of the Court of Appeals Act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus*, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, 4 Cranch, 75. The fourteenth section of the original Judiciary Act contained this language: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice Marshall, delivering the opinion of the court, partly on the significance and importance of the writ itself. But in the Court of Appeals Act there is no mention of *habeas corpus*, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing.

It will be borne in mind that the circuit court of appeals, which is a court created by statute, *Kentucky v. Powers*, 201 U. S. 1, 24, is not in terms endowed with any original jurisdic-

tion. It is only a court of appeal. Section 2 of the act says that it "shall be a court of record with appellate jurisdiction, as is hereafter limited and established." Section 6 provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases," etc. By Section 10 "whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the supreme court the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination." Sections 4, 13 and 15 name the courts whose judgments may be reviewed in the courts of appeals. Obviously the courts of appeals are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of *habeas corpus*.

For cases and discussion, see *In re Huse* (note), 25 C. C. A. 1.

ABLEMAN v. BOOTH.

Reported in 21 Howard, 506.

See above, p. 80.

f. Subpoena duces tecum.

That a federal court may issue a *subpoena duces tecum* under the authority of Judicial Code, Section 262, see *American Lithograph Co. v. Werckmeister*, 221 U. S. 603.

11. JURY TRIAL.

PARSONS v. BEDFORD.

Reported in 3 Peters, 433.

(1830.)

STORY, J., delivered the opinion of the court: The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial, is, it is believed, incorporated into, and secured in every state constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the

United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that "in suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, once tried by a jury, shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." At this time, there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law, in its widest meaning; and probably, no states were contemplated, in which it would not exist. The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence. The constitution had declared, in the third article, "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc., and to all cases of admiralty and maritime jurisdiction. It is well known, that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in distinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably, there were few, if any, states in the Union, in which some new legal remedies, differing from

the old common law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition, in the Judiciary Act of 1789, Ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section, it is provided, that "the trial of issues in fact in the district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;" and in the twelfth section, it is provided, that "the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty and maritime jurisdiction, be by jury;" and again, in the thirteenth section, it is provided, that the trial of issues in fact, in the supreme court, in all actions at law, against citizens of the United States, shall be by jury."

CAPITAL TRACTION CO. v. HOF.

Reported in 174 U. S. 1.
(1898.)

MR. JUSTICE GRAY delivered the opinion of the court: On September 8, 1896, the Capital Traction Company, a street railway corporation in the District of Columbia, presented to the supreme court of the district a petition for a writ of *certiorari* to a justice of the peace to prevent a civil action to recover damages in the sum of \$300 from being tried by a jury before him. * * *

The court of appeals was unanimous in maintaining the validity of the proceedings looking to a trial by a jury before the justice of the peace. But there was a difference of opinion between the two associate justices and the chief justice upon the question whether such a trial before the justice of the peace would be a trial by jury, according to the common law and the

constitution, as well as upon the question whether the trial by jury, allowed by congress in the supreme court of the district, upon appeal from the judgment of the justice of the peace, and upon the condition of giving bond to pay the final judgment of the appellate court, satisfied the requirements of the constitution.

I. The congress of the United States, being empowered by the constitution "to exercise exclusive legislation in all cases whatsoever" over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the district all legislative powers that the legislature of a state might exercise within the state, and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States. *Kendall v. United States* (1838), 12 Pet. 524, 619; *Mattingly v. District of Columbia* (1878), 97 U. S. 687, 690; *Gibbons v. District of Columbia* (1886), 116 U. S. 404, 407.

It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia. *Webster v. Reid* (1850), 11 How. 437, 460; *Callan v. Wilson* (1888), 127 U. S. 540, 550; *Thompson v. Utah* (1898), 170 U. S. 343.

The decision in this case mainly turns upon the scope and effect of the seventh amendment of the constitution of the United States. It may therefore be convenient, before particularly examining the acts of congress now in question, to refer to the circumstances preceding and attending the adoption of this amendment, to the contemporaneous understanding of its terms, and to the subsequent judicial interpretation thereof, as aids in ascertaining its true meaning, and its application to the case at bar.

II. The first continental congress, in the declaration of rights adopted October 14, 1774, unanimously resolved that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable

privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.

The Ordinance of 1787 declared that the inhabitants of the northwest territory should "always be entitled to the benefits of the writ of *habeas corpus* and of the trial by jury," "and of judicial proceedings according to the course of the common law." 1 Charters and Constitutions, 431.

The constitution of the United States, as originally adopted, merely provided in Article 3, Section 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury." In the convention which framed the constitution, a motion to add this clause, "and a trial by jury shall be preserved as usual in civil cases," was opposed by Mr. Gorham of Massachusetts, on the ground that "the constitution of juries is different in different states, and the trial itself is usual in different cases in different states," and was unanimously rejected. 5 Elliott's Debates, 550.

Mr. Hamilton, in number 81 of the Federalist, when discussing the clause of the constitution which confers upon this court "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make," and again, in more detail, in number 83, when answering the objection to the want of any provision securing trial by jury in civil actions, stated the diversity then existing in the laws of the different states regarding appeals and jury trials; and especially pointed out that in the New England states, and in those alone, appeals were allowed, as of course, from one jury to another, until there had been two verdicts on one side, and in no other state but Georgia was there any appeal from one to another jury. The diversity in the laws of the several states, he insisted, "shows the impropriety of a technical definition derived from the jurisprudence of any particular state," and "that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states." And he suggested that "the legislature of the United States would certainly have full power to provide that in appeals to the supreme court there should be no re-examination of facts where they had been tried in the original causes by juries;" but if this "should be thought too

extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial." 2 Federalist (ed. 1788), pp. 319-321, 335, 336.

At the first session of the first congress under the constitution, Mr. Madison, in the house of representatives, on June 8, 1789, submitted propositions to amend the constitution by adding, to the clause concerning the appellate jurisdiction of this court, the words, "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law," and to the clause concerning trial by jury these words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 Annals of Congress, 424, 435. And those propositions, somewhat altered in form, were embodied in a single article, which was proposed by congress on September 25, 1789, to the legislatures of the several states, and upon being duly ratified by them, became the seventh amendment to the constitution, in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

A comparison of the language of the seventh amendment, as finally made part of the constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in congress in 1789, strongly tends to the conclusion that the seventh amendment, in declaring that "no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law," had in view the common law of England, and not the rules of that law as modified by local statute or usage in any of the states.

This conclusion has been established, and "the rules of the common law" in this respect clearly stated and defined by judicial decision. * * * (Here court discusses many cases, then proceeds:)

It must, therefore, be taken as established, by virtue of the seventh amendment of the constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury had been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided can not be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and, therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury can not be tried anew, by a jury or otherwise, in any court of the United States.

The case of enforcing, in a court of the United States, a statute of a state giving one new trial, as of right, in an action of ejectment, is quite exceptional; and such a statute does not enlarge, but restricts, the rules of the common law as to re-examining facts once tried by a jury, for by the common law a party was not concluded by a single verdict and judgment in ejectment, but might bring as many successive ejectments as he pleased, unless restrained by a court of equity after repeated verdicts against him. *Bac. Ab. Ejectment, I; Equator Co. v. Hall* (1882), 106 U. S. 86; *Smale v. Mitchell* (1892), 143 U. S. 99.

III. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom

contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.

Lord Hale, in his *History of the Common Law*, Ch. 12, "touching trial by jury," says: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." And again, in summing up the advantages of trial by jury, he says: "It has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury." 2 Hale Hist. Com. Law (5th ed.), 147, 156. See also 1 Hale P. C. 33.

The supreme court of Ohio held that the provision of Article 1, Section 19, of the constitution of that state, requiring compensation for private property taken for the public use to "be assessed by a jury," was not satisfied without an assessment by a jury of twelve men under the supervision of a court; and, speaking by Chief Justice Therman, said: "That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." "We agree with Grimke, J., in *Willyard v. Hamilton*, 7 Ohio (pt. 2), 111, 118, that a jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court; that a presiding law tribunal is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference, that a mere commission, though composed of twelve men, can never be properly regarded as a jury. Upon the whole, after a careful examination of the subject, we are clearly of the opinion that the word 'jury,' in Section 19, of Article 1,

as well as in other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence and arguments of the parties." *Damb v. Lane* (1854), 4 Ohio St. 167, 177, 179.

The justices of the supreme judicial court of New Hampshire, in an opinion given to the house of representatives of the state, said: "The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly empanelled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." Opinion of Justices (1860), 41 N. H. 550, 551.

Judge Sprague, in the district court of the United States for the district of Massachusetts, said: "The constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial." "At the time of the adoption of the constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict." "Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the constitution was adopted." *United States v. Bags of Merchandise* (1863), 2 Sprague, 85-88.

This court has expressed the same idea, saying: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts." *Vicksburg, etc., Railroad v. Putnam* (1886), 118 U. S. 545, 553. And again: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination." *United States v. Philadelphia & Reading Railroad* (1887), 123 U. S. 113, 114. And see *Sparf v. United States* (1895), 156 U. S. 51, 102, 106; *Thompson v. Utah* (1898), 170 U. S. 343, 350; Miller on the Constitution, 511; Cooley's Principles of Constitutional Law, 239. * * *

Upon the whole matter, our conclusion is, that congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount by a justice of the peace, or in his presence, by a jury of twelve, or of any less number, allowing to either party, where the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace to a court of record, and to have a trial by jury in that court; that congress, in every case where the value in controversy exceeds five dollars, has authorized either party to appeal from the judgment of the justice of the peace, although entered upon the verdict of a jury, to the supreme court of the District of Columbia, and to have a trial by jury in that court; that the trial by a jury of twelve, as permitted by congress to be had before a justice of the peace, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the seventh amendment to the constitution; that therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being re-examined

by a jury in the appellate court; that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of congress upon the subject is in all respects consistent with the constitution of the United States; and that upon these grounds (which are substantially those taken by Chief Justice Alvey below) the judgment of the court of appeals, quashing the writ of *certiorari* to the justice of the peace, must be affirmed.

See Judicial Code, 1911, Sections 257 to 288, for constitution of the jury.

12. CLASSIFICATION OF PARTIES.

SHIELDS v. BARROW.

Reported in 17 Howard, 129.
(1854.)

MR. JUSTICE CURTIS delivered the opinion of the court: To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the circuit court of the United States for the eastern district of Louisiana, on the 19th of December, 1824, by Robert R. Barrow, a citizen of the state of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the state of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisiana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum of \$227,000, payable by installments, the last of which would fall due in March, 1844.

That negotiable paper was given for the consideration money, and from time to time \$107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase money, and proceedings instituted by attachment against Thomas R. Shields and William Bisland, one of his indorsers, for other parts of the

purchase money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant, of the first part, Thomas R. Shields, the purchaser, of the second part, and the six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants, were two. By this new contract the complainant was to receive back the property sold, retain the \$107,000 already paid, and the six indorsers executed their notes, payable to the complainant, amounting to thirty-two thousand dollars, in the manner and proportions following, as stated in the bill:

“The said William Bisland pays ten thousand dollars, in two equal installments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis \$6,966.66, on two notes indorsed by William Bisland. The said George S. Guion, \$2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, \$2,750, on two notes indorsed by George S. Guion. The said William B. Shields, \$4,766.66, on two notes indorsed by Mrs. Victoire Shields, and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank, in New Orleans.”

The complainant was to release the purchaser, Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer that the act of compromise may be declared to have been improperly procured, and may be annulled and set aside, and that the defendants may be decreed to pay such of the notes, bearing

their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the Act of Congress of February 28, 1839 (5 Stat. at Large, 321, Par. 1), nor the forty-seventh rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree.

In *Russell v. Clark's Executors*, 7 Cranch, 98, this court said: "The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray and Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court can not proceed to a final decision of the cause till they are parties."

The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the

court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now it will be perceivd, that in *Russell v. Clarke's Executors*, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they can not be reached; that persons having rights which must be affected by a decree, can not be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in *Russell v. Clarke's Executors*, concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see *Wormley v. Wormley*, 8 Wheat. 451; *Carneal v. Banks*, 10 *Ib.* 188; *Vattier v. Hinde*, 7 Pet. 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see *Cameron v. M'Roberts*, 3 Wheaton, 591; *Osborn v. The Bank of the United States*, 9 *Ib.* 738; *Harding v. Handy*, 11 *Ib.* 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see *Cameron v. M'Roberts*, 2 *Ib.* 571; *Mallow v. Hinde*, 12 *Ib.* 197.

In *Cameron v. M'Roberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in *Mallow v. Hinde*, 12 Wheat. 196, 198.

Such was the state of the laws on this subject when the Act of Congress of February 28, 1839 (5 Stat. at Large, 321), was passed, and the forty-seventh rule, for the equity practice of the circuit court of the United States, was made by this court.

The first section of that statute enacts: That when, in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron v. M'Roberts*, 3 Wheat. 591; *Osborn v. The Bank of the United States*, 9 Ib. 723; and *Harding v. Handy*, 11 Ib. 132. For this court had already there decided, that the nonjoinder of a party, who could not be served with process, would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain

jurisdiction; but, as is observed by this court, in *Mallow v. Hinde*, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the forty-seventh rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan v. Walker*, 14 How. 36. It remains true, notwithstanding the act of congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice can not be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat. 167: "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court can not reach—as if such party be a resident of another state—ought not to prevent a decree upon its merits." But if the case can not be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the act of congress and of the forty-seventh rule of this court, because they seem to have been misunderstood, and misapplied in this case: it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed.

BARNEY v. BALTIMORE.

Reported in 6 Wallace, 280.

(1867.)

APPEAL from the circuit court for Maryland.

The Judiciary Act gives jurisdiction to the circuit court in controversies "between citizens of different states;" the District of Columbia, as it has been held, not coming within this term.

Another act—one of February 28, 1839—enacts thus:

That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it. But the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no manner of abatement or other objection to said suit.

In this state of statutory law, Mary Barney, a citizen of Delaware, and one of the heirs of Samuel Chase, filed a bill in the circuit court of the United States for Maryland against the city of Baltimore and several individuals, co-heirs with her, certain of them being citizens of Maryland, and certain others (William, Matilda and Ann Ridgely), citizens of the District of Columbia, to have a partition of real estate of which it was alleged that the said Chase died intestate; and to have also an account of rents and profits, with other incidental relief.

In the progress of the suit, the bill was dismissed as to the three Ridgelys, citizens of the District, and an amended bill filed, stating that they had conveyed their interest in the property in controversy to one Samuel Chase Ridgely (also a defendant in the case), and who was a citizen of Maryland; it being admitted by writing filed that this conveyance was made for the purpose of conferring jurisdiction of the case on the federal court, that it was without consideration, and that the grantee would, on request of the grantors, reconvey to them. This Samuel Chase Ridgely made his will soon after the conveyance,

devising the property to his three grantors, the District Ridgelys, and having died during the pendency of the suit, it went back to them. They then conveyed to one Proud in the same way as they had previously conveyed to their co-defendant, S. C. Ridgely, it being admitted that the conveyance was executed to remove a difficulty in the way of the exercise of the jurisdiction of the circuit court.

The circuit court dismissed the bill by a decree which on its face appeared to be a dismissal on the merits. This appeal was then taken.

Coming here, the case was elaborately argued on the merits. But a point of jurisdiction was raised and discussed previously. On this latter point the case was disposed of by this court; the question of merits not being reached.

MR. JUSTICE MILLER delivered the opinion of the court: The first question which the record before us presents is, whether the circuit court of the district of Maryland, sitting as a court of chancery, could entertain jurisdiction of the case? The difficulty arises in reference to the interest of William, Ann and Matilda Ridgely, in the subject-matter of the litigation, and resolves itself into two distinct inquiries, namely:

1. Can a court of chancery render a decree upon a bill of this character without having before it, as parties to the suit, some person capable of representing their interest?

2. And secondly, if it can not, did the contrivance resorted to, of conveying to S. C. Ridgely and Proud, taken in connection with the admitted facts on that subject, enable the court to take jurisdiction of the case?

The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suits are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this can not be done, it will proceed to administer such relief

as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court can not proceed. In such cases the court refuses to entertain the suit, when these parties can not be subjected to its jurisdiction.

This class can not be better described than in the language of this court, in *Shields v. Barrow*, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be "persons who not only have an interest in the controversy, but an interest of such a nature, that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit, and in the account which is asked for, of rents and profits. If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree can not bind them, the court can not for that very reason afford the relief asked, to the other parties.

If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to these parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties. The same observations apply to any account stated by the court of rents and profits, and to any decree settling the amount due on that score. * * *

We are, therefore, of opinion that the circuit court could render no decree on the merits of this case, without having rightfully before it some person representing the interest of the Ridgelys.

Additional discussion may be found to same general effect in *Russell v. Clarke's Executors*, 7 Cr. 69, 98; *Mallow v. Hinde*, 12 Wh. 193; *California v. Sou. Pac. Co.*, 157 U. S. 229, at pp. 249, 250.

See, also, Rules of Practice in Equity, Rules Nos. 37 to 40; and Judicial Code, 1911, Section 50.

13. SUIT AGAINST A STATE BY A CITIZEN.

See Constitution, Article III, Section 2.

CHISHOLM v. GEORGIA.

Reported in 2 Dallas, 419.

(1793.)

THIS action was instituted in August term, 1792. On the 11th of July, 1792, the marshal for the district of Georgia made the following return:

“Executed as within commanded, that is to say, served a copy thereof on his excellency Edward Telfair, Esq., governor of the state of Georgia, and one other copy on Thomas P. Carnes, Esq., the attorney general of said state. Robert Forsythe, marshal.”

Upon which, Mr. Randolph, the attorney general of the United States, as counsel for the plaintiff, made the following motion, on the 11th day of August, 1792: “That unless the state of Georgia, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said state, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said state, and a writ of inquiry of damages shall be awarded.” But to avoid every appearance of precipitancy, and to give the state time to deliberate on the measures she ought to adopt, on motion of Mr. Randolph, it was ordered by the court, that the consideration of this motion should be postponed to the present term.

JAY, Chief Justice: * * * The question now before us renders it necessary to pay particular attention to that part of the second section, which extends the judicial power “to controversies between a state and citizens of another state.” It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a state may be plaintiff. The ordinary rules for construction will early decide, whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good, that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a state and citizens of another state." If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable, that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the constitution. It can not be pretended, that where citizens urge and insist upon demands against a state, which the state refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute, are made by a state against citizens of another state, or by the latter against the former? When power is thus extended to a controversy it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to insure justice to all: to the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality as to give to the collective citizens of one state, a right of suing individual

citizens of another state, and yet deny to those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas, in a subsequent clause, in which the constitution ordains, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Did it mean here party-plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptance, and the word party being, in common usage, applicable both to plaintiff and defendant, we can not limit it to one of them, in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the thirteenth section of the Judicial Act, of controversies where a state is a party, and as they do not impliedly or expressly, apply that term to either of the litigants, in particular, we are to understand them as speaking of both. In the same section, they distinguish the cases where ambassadors are plaintiffs, from those in which ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose, that they would, in like manner, have distinguished between cases where a state was plaintiff, and where a state was defendant, if they had intended to make any difference between them; or if they had apprehended that the constitution had made any difference between them.

I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: The same section of the constitution which extends the judicial power to controversies "between a state and the citizens of another state," does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: In all cases of actions against states or individual citizens,

the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view.

I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing, between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear, it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to show that the sentiments of the best writers on government and the rights of men, harmonize with the principles which direct my judgment on the present question. The acts of the former congresses, and the acts of many of the state conventions, are replete with similar ideas; and to the honor of the United States, it may be observed, that in no other country are subjects of this kind better, if so well, understood. The attention and attachment of the constitution to the equal rights of the people are discernible in almost every sentence of it; and it is to be regretted that the provision in it which we have been considering, has not, in every instance, received the approbation and acquiescence which it merits. Georgia has, in strong language, advocated the cause of republican equality: and there is reason to hope, that the people of that state will yet perceive that it would not have been consistent with that equality, to have exempted the body of her citizens from that suability, which they are at this moment exercising against citizens of another state.

For my own part, I am convinced, that the sense in which I understand and have explained the words “controversies be-

tween states and citizens of another state," is the true sense. The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice, without respect of persons, and by securing individual citizens, as well as states, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring state; because it obviates occasions of quarrels between states on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man to a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice, without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently, that fellow citizens and joint sovereigns can not be degraded, by appearing with each other, in their own courts, to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of constitutional law and government can insure the continuance and enjoyment of them.

For the reason before given, I am clearly of opinion, that a state is suable by citizens of another state; but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, viz.: That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say, that an individual may sue a state on bills of credit issued before the constitution was established, and which were issued and received on the faith of the state, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

The following order was made:

BY THE COURT: It is ordered, that the plaintiff in this cause do file his declaration on or before the first day of March next.

Ordered, that certified copies of the said declaration be served on the governor and attorney general of the state of Georgia, on or before the first day of June next.

Ordered, that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of next term, judgment by default shall be entered against the said state.^{1 2}

¹Justices Wilson, Blair, Cushing, and C. J. Jay agree, but Justice Fredell took the opposite view.

²In February term, 1794, judgment was rendered for the plaintiff, and a writ of inquiry awarded. The writ, however, was not sued out and executed; so that this clause, and all the other suits against states, were swept at once from the records of the court, by the amendment of the federal constitution, agreeable to the unanimous determination of the judges, in *Hollingsworth v. Virginia*, argued at February term, 1798 (3 Dall. 378).

In *Governor of Georgia v. Madrazo*, reported in 1 Peters, 110 (1828), it is said: "The libel of Madrazo alleges, that the slaves which he claims, 'were delivered over to the government of the state of Georgia, pursuant to an act of the general assembly of the said state, carrying into effect an act of congress of the United States, in that case made and provided; a part of the said slaves, sold as permitted by said act of congress, and as directed by an act of the general assembly of the said state; and the proceeds paid into the treasury of the said state, amount to \$38,000, or more.' The governor appears and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the legislature of Georgia, made to give effect to the act of congress on the subject of negroes, mulattoes or people of color, brought illegally into the United States; and the proceeds of those unsold to have been paid into the treasury, and to be no longer under his control. The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money had been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of congress. The possession has been acquired, by means which it was lawful to employ. The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a

different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think, the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made."

See eleventh amendment.

In *Louisiana v. Jumel*, 107 U. S. 711, a suit by creditors at large, of the class provided for in the legislative act of Louisiana of 1874, to compel, by judicial process, the officers of the state to enforce the provisions of the act when the state, by an amendment to its constitution, in 1879, had undertaken to prevent the officers from doing so. These officers were a state board of liquidation, and were sued as executive officers of the state, in their official capacity, and so the state was really the defendant. The state was charged here with impairing the obligation of its contracts on bonds, but the remedy sought—mandamus—implies power in the federal judiciary to compel the state to perform its contracts at the suit of a citizen of another state, which is prohibited by the eleventh amendment.

Hagood v. Southern, 117 U. S. 52, affirmed and applied the doctrine of *Louisiana v. Jumel*, and indicated the distinction among the cases where (a) relief sought against state officers is the performance of a plain official duty requiring no exercise of discretion, or (b) state officers under color of a state authority which is unconstitutional have invaded and violated personal and property rights, in both which cases a state officer may be sued by a citizen of another state, and (c) where the relief sought is affirmative official action by state officers and in performing an obligation which attaches to the state in its political capacity.

The earlier cases are reviewed.

In *Board of Liquidation v. McComb*, 92 U. S. 531, at p. 541, the court, J. Bradley, says: "The objections to proceeding against state officers by mandamus or injunction are: first, that it is in effect, proceeding against the state itself; and secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, can not be sued by an individual; and a court can not substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the

courts as null and void. *Osborn v. Bank of the United States*, 9 Wheat. 859; *Davis v. Gray*, 16 Wall. 220."

For review of cases, see *In re Ayres*, 123 U. S. 443, and *Ex parte Young*, 209 U. S. 123, at pp. 150, 151, and at pp. 159, 160, the court says: "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional.

"If the act which the state attorney general seeks to enforce be a violation of the federal constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct."

HOPKINS v. CLEMSON.

Reported in 221 U. S. 636.

(1911.)

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court: The plaintiff sued the Clemson Agricultural College of South Carolina, for damages to his farm, resulting from the college having built a dyke which forced the waters of the Seneca river across his land, whereby the soil had been washed away and the land ruined for agricultural purposes. There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property and had constructed the dyke as a public agent only, by authority of the state, on land belonging to the state. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence the complaint was dismissed.

The ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

With the exception named in the constitution, every state has absolute immunity from suit. Without its consent it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the eleventh amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the state's power of taxation; or to pay out its money in his possession on the state's obligations; or to execute a contract, or to do any affirmative act which affects the state's political or property rights. *Cunningham v. Macon & Brunswick R. R.*, 109 U. S. 446; *North Carolina v. Temple*, 134 U. S. 22; *Louisiana v. Steel*, 134 U. S. 230; *Louisiana v. Jumel*, 107 U. S. 711; *Pennoyer v. McConnaughy*, 140 U. S. 1; *In re Ayers*, 123 U. S. 443; *Hans v. Louisiana*, 134 U. S. 1; *Harkrader v. Wadley*, 172 U. S. 148; *Hagood v. Southern*, 117 U. S. 52, 70.

But immunity from suit is a high attribute of sovereignty—a prerogative of the state itself—which can not be availed of by public agents when sued for their own torts. The eleventh amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how “can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants * * * whenever they interpose the shield of the state. * * * The whole frame and scheme of the political institutions of country, state and federal, protest” against extending to any agent the sovereign's exemption from legal process. *Poindexter v. Greenhow*, 114 U. S. 270, 291.

The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were

indeed agents, acting for the state, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham v. Macon & Brunswick R. R.*, 109 U. S. 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury.

Consequently there have been recoveries in ejectment where the public agent in possession defended under a void title of the government. *United States v. Lee*, 106 U. S. 196; *Tindal v. Wesley*, 167 U. S. 204. A suit against a bank was sustained even though the state held part of the stock, *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904. A tax collector was enjoined, where, under an unconstitutional law, he was about to sell the property of the taxpayer. *Poindexter v. Greenhow*, 114 U. S. 270. An attorney general was restrained from suing to recover penalties imposed by an unconstitutional statute, *Ex parte Young*, 209 U. S. 123. Commissioners have been enjoined from enforcing confiscatory rates, *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Prout v. Starr*, 188 U. S. 537. A state land commissioner was enjoined from proceeding, under an unconstitutional act, to cause irreparable damage to defendant's property rights, *Pennoyer v. McConnaughy*, 140 U. S. 1. Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce, *McNeill v. Southern Ry.*, 202 U. S. 543; *Railway Commission v. Illinois Central R. R.*, 203 U. S. 335.

Other cases might be cited which deny public boards, agents and officers, immunity from suit. But the principle underlying the decisions is the same. All recognize that the state, as a sovereign, is not subject to suit; that the state can not be enjoined; and that the state's officers, when sued, can not be

restrained from enforcing the state's laws or be held liable for the consequence flowing from obedience to the state's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and his claim of exemption from suit.

It is said, however, that, in the cases referred to, the officers were held liable to suit because in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the state. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the state itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. In *County of Lincoln v. Luning*, 133 U. S. 529, 530, the court said that: "While a county is territorially a part of the state yet politically it is also a corporation, created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part." The court there held that the eleventh amendment was limited to those cases in which the state is the real party, or party on the record, but that counties were corporations which might be sued. *Dunn v. University of Oregon*, 9 Oregon, 357, 362; *Herr v. Kentucky Lunatic Asylum*, 97 Kentucky, 458, 463, S. C., 28 L. R. A. 394.

Corporate agents or individual officers of the state stand in no better position than officers of the general government, and as to them it has often been held that: "The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured, even by authority of the United States." *Belknap v. Schild*, 161 U. S. 10, 18.

Undoubtedly counties, cities, townships and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They can not rely on freedom from accountability as could a state.

In this case there is no question of corporate existence and no claim that building the dyke was *ultra vires*. Plaintiff was denied a hearing, not on the ground that his complaint did not set out a cause of action, but solely for the reason that even if the college did destroy his farm, the court had no jurisdiction over a public agent.

If the state had in so many words granted the college authority to take or damage the plaintiff's property for its corporate advantage without compensation, the constitution would have substituted liability for the attempted exemption. But the state of South Carolina passed on such act and attempted to grant no such immunity from suit as is claimed by the college. On the contrary, the statute created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.

Reference is made, however, to *Kansas, ex rel., Little v. University of Kansas*, and the note to 29 L. R. A. 378, where state colleges, prison boards, lunatic asylums and other public institutions have been held to be agents of the state not liable to suit unless expressly made so by statute.

But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit, on the same ground that municipalities are held not to be responsible for the negligence of policemen, jailers, prison guards, firemen, and other agents performing governmental duties. *Workman v. Mayor of N. Y.*, 179 U. S. 556. That general rule is of force in South Carolina, as appears from *Gibbs v. Beaufort*, 20 S. Car. 213, 218, cited in the opinion of the court below, where it was said that "a municipal corporation,

instituted for the purpose of assisting a state in the conduct of local self-government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so by statute.” But the plaintiff is not seeking here to hold the college liable for the nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the college itself for its own corporate act in building a dyke, whereby the channel had been narrowed, the swift current had been diverted from the usual course across the plaintiff’s farm, and, as it is alleged, destroying the banks, washing away the soil and for all practical purposes as effectually depriving him of his property as if there had been a physical taking. Compare Lewis on Eminent Domain, 2d Ed. Section 67; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Lynah*, 188 U. S. 445; *United States v. Welch*, 217 U. S. 333; *Chicago, etc., v. Chicago*, 166 U. S. 226; Farnham on Waters, Section 191; *Conniff v. San Francisco*, 67 California, 45, 50.

Again, and still treating the question as though involved in the plea to the jurisdiction, this is not an action against the college for a tort committed in the prosecution of any governmental function. The fee was in the state, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the college, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff’s farm. 2 Dillon M. Corp. (4th ed.) Section 966, p. 1180.

As a part of its plea to the jurisdiction, the college also claimed that “it never had any interest or title in the land

described in the complaint, or in any other property connected with the establishment and maintenance of Clemson Agricultural College of South Carolina, all of it being the property of the state of South Carolina.” And it is argued that the court could take no jurisdiction of a case against a public corporation which, at most, could only result in a judgment unenforceable by levy and sale under execution.

As a matter of fact, the record indicates that besides the state’s annual appropriation and the interest on securities held under the residuary clause of Dr. Clemson’s will, the college has other sources of income. It appears to own some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff’s favor could be satisfied. Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in a plea to the jurisdiction, afford no reason why the college should be granted immunity from suit, when it is claimed that, in violation of the constitution, it has taken private property for its corporate purposes without compensation.

The plaintiff prayed not only for damages but that the embankment should be removed. The title to the land and everything annexed to the soil is in the state, subject to the conditions named in the will. The state, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court can not decree the removal of the embankment which forms a part of the state’s property. *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446. But the prayer for that part of the relief can be stricken out without depriving the court of jurisdiction to hear and determine the question whether Clemson Agricultural College of South Carolina is liable to the plaintiff for its own corporate act in building for its own proprietary and corporate purposes a dyke which it is alleged damaged or took the plaintiff’s farm.

Columbia Waterpower Company v. Electric Co., 43 S. Car. 154, 167, 169. And, if the facts hereafter warrant it, the college may be enjoined against further acts looking to the maintenance or reconstruction of the dyke. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion. *Reversed.*

An action is maintainable in the United States courts to enjoin a state board of assessment and valuation, and other state officers, from apportioning and certifying an assessment of plaintiff's property for taxation and proceedings by said officers to enforce payment to the state of taxes levied on such assessment. *L. & N. Ry. v. Bosworth*, 209 Fed. Rep. 380.

That suit by depositor against members of state banking board and bank commissioner to compel payments, etc., from the depositors' guaranty fund is a suit against the state and hence not maintainable in the federal courts, see *Lankford v. Platte Iron Works*, 235 U. S. 461.

B. ORIGINAL JURISDICTION.

1. THE DISTRICT COURT.

See Judicial Code, 1911, Section 24, Paragraph 1.

In *Sheldon v. Sill*, 8 How. 441, at p. 448, the court (Justice Grier) says: "It must be admitted, that if the constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by congress must exercise all the judicial powers not given to the supreme court, or that congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."

a. Conflicting land grants.

TOWN OF PAWLET v. CLARK.

Reported in 9 Cranch, 292.
(1815.)

STORY, Justice, delivered the opinion of the court, as follows:
* * * But it seems to us, that there is nothing in this objection. The constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed, that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact, whether grants arose under the same or under different states. Now, it is very clear, that although the territory of Vermont was once a part of New Hampshire, yet the state of Vermont, in its sovereign capacity, is not, and never was the same as the state of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of

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Vermont; that of the defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same, although it has lost a part of its territory; that of Vermont never existed, until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same, than the circumstance that a part of the members of one corporation constitutes a component part of another corporation, makes the corporation the same. Nor can it be affirmed, in any correct sense, that the grants are of the same state; for the grant of the defendants could not have been made by the state of Vermont, since that state had not, at that time, any legal existence; and the grant of the plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence, by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the constitution. It would, indeed, have been a sufficient answer to the objection, that the constitution and laws of the United States, by the admission of Vermont into the Union as a distinct government, had decided that it was a different state from that of New Hampshire.

COLSON v. LEWIS.

Reported in 2 Wheaton, 377.

(March 14, 1817.)

The opinion of the court in this cause was delivered by WASHINGTON, Justice: This suit in equity was removed into the circuit court of Kentucky, upon the petition of the defendant, filed in the state court; and upon a motion made in the circuit court, to dismiss the suit from that jurisdiction, the judges of that court were opposed in opinion, and caused the following facts to be stated, to enable this court to decide the question. Those facts are, that the value of the land in controversy exceeds \$500; that the complainants are citizens of Virginia; and that the grant, under which they claim title, is derived from the state of Kentucky, by virtue of warrants issued from the land office of Virginia, and locations upon the warrants, before the separation of Kentucky from Virginia; that

the defendant's grant is from the state of Virginia, by virtue of a warrant issued from the land office, and a location made thereon, before the separation of Kentucky.

The question referred to this court is, whether the circuit court for the district of Kentucky can take jurisdiction of the cause, because the grants for the land in controversy, lying in Kentucky, were issued, the one by the state of Virginia, and the other by the state of Kentucky, when both grants purport to be founded upon warrants and locations made under the authority of the laws of Virginia?

It is the opinion of this court, that the question which is referred to us, by the circuit court of Kentucky, is settled by the decision of this court, in the case of the *Town of Pawlet v. Clark and others*, 9 Cranch, 292. The only difference between the two cases is, that in the case referred to, both parties claimed immediately under grants, the one from the state of Vermont, and the other from the state of New Hampshire, before the separation, which grants were the inception of title; and that, in this case, both parties claim under grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. But where the controversy arises upon claims founded upon grants from different states, as the present case is understood to be, the principle decided in the case which has been cited, precisely governs this. The decision in that case is founded on the words of the constitution of the United States, which extends the judicial power of the United States to controversies between citizens of the same state, claiming lands under grants of different states. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties, prior to the grant.¹ *Certificate accordingly.*

¹ For the statutory provision, see 18 Stat. L., p. 470, 2nd Sess., 43rd Cong., Ch. 137. Act March 3, 1875, and Judicial Code of 1911, Section 24, p. 1 (36 Stat. L. 1087, 1091).

b. Suit by United States.

See act of September 24, 1789, Section 9; 1 Stat. L. p. 77; Story on the Constitution, 5th ed., Section 1279.

c. Jurisdictional amount.

LEE v. WATSON.

Reported in 1 Wallace, 337.

(1863.)

MR. JUSTICE FIELD delivered the opinion of the court: It appears from the certificate of the presiding judge of the court below, indorsed in the writ of error, that the writ and original declaration in the case showed that the amount in controversy did not exceed one thousand dollars, and that the evidence offered by the plaintiffs at the trial showed that it did not exceed seven hundred dollars; and that in the progress of the cause an amendment was made in the amount of damages claimed, for the purpose of bringing the case within the appellate jurisdiction of this court. It is hardly necessary to add that upon the facts thus stated—and the correctness of the certificate is not questioned—the court will not entertain jurisdiction of the case.

To authorize a re-examination of a final judgment of the circuit court, the matter in dispute must, with some exceptions, exceed the sum or value of two thousand dollars. By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff. It certainly would not be pretended that this court would hear a case where the plaintiff counted solely upon a promissory note of two hundred dollars, simply because he concluded his declaration with an averment that he had sustained damages from its nonpayment of over two thousand,

and prayed judgment for the latter sum. Reference must be had both to the debt claimed and to the damages alleged, or the prayer for judgment. The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled by the allegations in the body of the declaration.

Taking in the present case the certificate of the judge below as correct, the amount in controversy—that is, the debt alleged in the original declaration—did not exceed one thousand dollars; the jurisdiction is not therefore acquired by this court from the amendment in the amount of the damages claimed. The writ of error is *dismissed*.

GRAY v. BLANCHARD.

Reported in 97 U. S. 564.

(1878.)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: This is a writ of error sued out by the defendant below, when the judgment against him upon money demand was for only \$1,118.71. *Prima facie* this is the measure of our jurisdiction in favor of the present plaintiff in error; but he still thinks we must retain the cause, as the record shows that, having pleaded the general issue, he gave notice of set-off, claiming \$10,000. It is true that such notice was given, but it is shown affirmatively by the record that the only dispute upon the trial under the notice was as to a single item, of the amount of \$446. In short, the bill of exceptions shows distinctly that the only controversy between the parties was in respect to a claim by the plaintiff below of about \$2,000, and by the defendant (plaintiff in error) as to this item of set-off. In his application for the removal of the cause from the state court to the circuit court, the plaintiff in error made this statement, to wit: "The matter in dispute exceeds, exclusive of costs, the sum of \$500, and is of the value of \$2,000;" and the judge, in his charge to the jury, alluded to the fact that the amount in controversy was not sufficient to entitle the parties to a review in this court.

In *Lee v. Watson* (1 Wall. 337), it was held that "in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as

stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction." To the same effect is *Schacker v. Hartford Fire Insurance Co.* (93 U. S. 241), where we dismissed a case in which it appeared that the action was upon a policy of insurance for \$1,400, because, although damages to our jurisdictional amount were claimed, it was apparent from the whole record that there could not be a recovery for more than the amount of the policy, and a small sum in addition for interest.

The principles upon which those cases rest are decisive of this. While in the absence of any thing to the contrary the prayer for judgment by the plaintiff, in his declaration or complaint, upon a demand for money only, or by the defendant in his counterclaim or set-off, will be taken as indicating the amount in dispute, yet if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining our jurisdiction. Ordinarily this will be found in the pleadings, but we need not necessarily confine ourselves to them. We hear the case upon the record which is sent up, and if, taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed. Here it is affirmatively shown that the value of the "matter in dispute" is less than our jurisdictional amount. The motion to dismiss will therefore be granted, and it is *so ordered*.

LEWIS MERCANTILE CO v. KLEPNER.

Reported in 176 Fed. 343, 100 C. C. A. 285.

(1910.)

IN error to the circuit court of the United States for the southern district of New York.

Action by Annie Klepner against the O. J. Lewis Mercantile Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to the circuit court of the United States for the southern district of New York to review a judgment entered on the verdict of a jury in favor of the plaintiff for \$1,649.05. The interest and costs, amounting to \$881.98, made the total amount of the judgment \$2,531.03, which was entered

November 11, 1908. Upon a former trial a verdict was directed in favor of the defendant, this judgment was reversed and a new trial ordered by this court, the opinion being reported in 159 Fed. 94, 86 C. C. A. 284. * * *

COXE, Circuit Judge: * * * The contention that the court has no jurisdiction because the amount involved is less than \$2,000 proceeds, we think, upon a mistaken interpretation of the Judiciary Act (Act March 3, 1875, c. 137, 18 Stat. 470) as amended in 1887-88 (Act March 3, 1887, c. 373, 24 Stat. 552; Act August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). Section 1 provides that the circuit courts shall have original cognizance of certain designated suits at common law "in which the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars." "The amount in dispute"—says the defendant's brief—"was legally determined at the trial, at less than \$1,868.25 exclusive of interest and costs."

If the amount of the recovery were to settle the question it would never be possible, in an action where the damages are in the discretion of the jury, to ascertain whether the court has jurisdiction until the jury has reported. The question is—did the court have jurisdiction *in limine*, had the plaintiff a cause of action upon which he might recover more than \$2,000? This question must be answered by an examination of the pleadings. The fact that the verdict was for less than \$2,000, that plaintiff, after she discovered that the goods were being sold at ruinous prices, was willing to take less than that sum in settlement, and the fact that the theory of the recovery was changed at the trial to conform to the proof and thus was limited to a sum less than the jurisdictional amount, are not, in our opinion, germane to the question. It would produce a grotesque and an intolerable condition if the law were interpreted so as to permit the jurisdiction to depend upon the decision of the court or jury upon disputed questions of fact.

In her amended complaint the plaintiff "demands judgment against the defendant for the sum of \$2,550 with interest." Of course it is not pretended, if on the face of the complaint it clearly appears that the plaintiff can not recover more than

\$2,000, that the mere demand in excess of that sum will give the court jurisdiction. If, on the other hand, the demand is made in good faith and is justified by a fair and reasonable interpretation of the facts it is the true criterion. The rule is well stated in *Peeler v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, as follows:

“It is not the amount a plaintiff is able to prove he is entitled to that determines the amount in dispute for the purpose of jurisdiction, for otherwise the failure of a plaintiff to recover would oust the court of jurisdiction. The amount in dispute or matter in controversy, which determines the jurisdiction of the circuit courts in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith.”

In *Washington County v. Williams*, 111 Fed. 801, 811, 49 C. C. A. 621, 631, it is said:

“The amount claimed in the declaration or complaint, not the amount of recovery, is the test of jurisdiction, and the fact that a sum in excess of \$2,000 exclusive of interest and costs, was claimed, gave the trial court jurisdiction to render a judgment for a less amount unless this court is able to find that a demand for a sum in excess of \$2,000 was interposed in bad faith, for no other purpose than to give the federal court jurisdiction.”

The theory of the complaint was that when the defendant violated its obligations under the contract, the plaintiff was entitled to recover, not the invoice value or cost price of the goods, but the actual value, as measured by the highest market value at the time of the breach, which was alleged to be \$3,000. There is nothing to indicate bad faith in this demand, indeed, from the plaintiff's point of view it was the reasonable demand to make and was justified by the facts. The trial court, against the plaintiff's objection and exception, limited the recovery to the prices stated in the invoice, but we can not say that this ruling establishes the bad faith of the plaintiff in demanding the full value of the property of which she had been deprived by alleged unlawful conduct of the defendant.

Again, the defendant interposed a counterclaim and, having invoked the jurisdiction of the court for its own benefit, is now estopped from denying it. *Merchant's Co. v. Clow*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

We have examined the other exceptions argued and are of the opinion that none of them is well taken. The cause was fairly submitted to the jury and no prejudicial error was committed. The judgment is affirmed with costs.

WILSON v. DANIEL.

Reported in 3 Dallas, 401.
(1798.)

IREDELL, Justice: I differ from the opinion which is entertained by a majority of the court, on the second exception; though, if the merits of the cause had been involved, I should have declined expressing my sentiments. As, however, the question is a general question of construction, and is of great importance, I think it a duty, briefly, to assign the reasons of my dissent.

The true motive for introducing the provision, which is under consideration, into the Judicial Act, is evident. When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided, that unless the matter in dispute exceeded the sum or value of \$2,000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error. In the original suit, indeed, I agree, that the demand of the party furnishes the rule of valuation; but the writ of error is of the nature of a new suit; and whatever may have been formerly the question on the merits, if we think the plaintiff is not entitled to recover more than \$1,800, the court has not jurisdiction of a cause of such value, and can not, of course, pronounce a judgment in it.

At common law, indeed, the penalty of the bond was alone regarded; and though, in a case like the present, only one shilling damages should be given by the jury, the judgment at common law would be rendered for the whole penalty; so that the suffering party would be obliged to resort to a court of equity for relief. The legislature, however, has deemed it expedient to guard against the mischief, and at the same time, to prevent

a circuity of action, by empowering the common law courts to render judgment, in causes brought to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, for so much as is due, according to equity. From the time of passing the act, the plaintiff can recover no more, under the penalty of the bond, than the damages assessed or adjudged; and if a court of common law is thus empowered to regard the matter in dispute, independent of the strict common law forfeiture of the penalty, this ought to be deemed, to every legal intent, the proper mode of settling and ascertaining the value or amount, to which the words of the law shall be applied, in the case of a writ of error.

The objection, which seemed, principally, to operate against this doctrine, in the mind of the court, as well as of the bar, was its tendency to entitle one party to a writ of error, and to exclude the other: but the objection can not arise in this case, as both parties would be alike estopped by the insufficiency of the sum. A new law, however, of a scope so extensive, can not be expected to provide for every possible case; and it is no reason why a plain provision should not operate, that another provision may be necessary to avoid an inconvenience, or to establish equality between the parties.

I must, therefore, repeat my opinion, that although the plaintiff's demand is to be regarded in the original action; yet, that the sum actually rendered by the judgment, is to furnish the rule for fixing the matter in dispute upon a writ of error. And the sum actually rendered being less than \$2,000, the court can not, I think, exercise a jurisdiction in the present cause.

GORDON v. OGDEN.

Reported in 3 Peters, 33.

(1830.)

WRIT of error to the circuit court for the district of Louisiana.

Mr. Ogden moved to dismiss the writ of error in this case, on the ground that the court had not jurisdiction of the cause, the sum in controversy not amounting to two thousand dollars, the amount for which a writ of error is allowed. He stated, that the action was instituted for the violation of a patent, and

the amount of the recovery in damages was four hundred dollars, by the verdict of the jury. If, under the provision of the patent law, the damages are to be trebled, it will not amount to a sum authorizing the writ of error.

Although the damages laid in the declaration are two thousand six hundred dollars, yet, after verdict, as the writ of error is taken by the defendant below, the only matter in dispute here is the amount of the verdict, or at most, treble that sum, being twelve hundred dollars. If the sum stated in the declaration shall be allowed to ascertain the amount in dispute, in every case of tort or of claims of uncertain damages, the plaintiff, who might insert any sum in his declaration, could secure the right to a writ of error to this court.

Mr. Coxe, for the plaintiff in error, the defendant below, on the authority of *Wilson v. Daniel*, 3 Dall. Rep. 401, 1 Condensed Reports, 185, contended, that the matter in dispute originally, determined the jurisdiction; and in this case the sum stated in the declaration ascertains the amount. He also cited *Peyton v. Robertson*, 9 Wheaton, 527; *Cooke v. Woodrow*, 5 Cranch, 14.

MR. C. J. MARSHALL delivered the opinion of the court:

A motion has been made to dismiss this writ of error because the court has no jurisdiction over it. The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum. The defendant below has sued out a writ of error, and contends now that the matter in dispute is not determined by the judgment, but by the sum claimed in the declaration.

This court has jurisdiction over final judgments and decrees of the circuit court, where the matter in dispute exceeds the sum or value of two thousand dollars. The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dis-

ORDER.

Mr. Ogden, of counsel for the defendant in error, moved the court to dismiss this writ of error for the want of jurisdiction, because the matters or sum in controversy, exclusive of costs, did not exceed two thousand dollars; which was opposed by Mr. Benedict, of counsel for the plaintiff in error, who contended that although the judgment of the circuit court was only for one thousand seven hundred and twenty dollars, yet that the interest on that sum added thereto would make it exceed two thousand dollars. To which Mr. Ogden rejoined, that the right of the party to a writ of error, was controlled by the amount at the rendition of the judgment and could not be enlarged by time. On consideration whereof, It is the opinion of this court that where the plaintiff in the court below claims two thousand dollars or more, and the ruling of the court is for a less sum, that he is entitled to a writ of error: but that the defendant in the court below is not entitled to such writ where the judgment against him is for a less sum than two thousand dollars at the time of the rendition thereof—that this is the settled practice of this court. Whereupon it is now here ordered and adjudged by this court that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

February 3d.

ELGIN v. MARSHALL.

Reported in 106 U. S. 578.

(1882.)

MR. JUSTICE MATTHEWS delivered the opinion of the court: This action was brought by Marshall and another, being citizens of Wisconsin, against the town of Elgin, Minnesota, to recover the amount due upon certain coupons or interest warrants, detached from municipal bonds, alleged to have been issued by it, in aid of a railroad company. The defense set up was that the bonds and coupons were void, the statute, under the assumed authority of which they had been issued, being, as was alleged, unconstitutional. The cause was tried by the court without the intervention of a jury, and it is part of the finding that, at the time of rendering the judgment, the plaintiffs were the owners of the bonds and coupons mentioned in the complaint. Judg-

ment was given for the amount, \$1,660.75, due thereon, being for the interest on fifteen bonds of five hundred dollars each. The town brought this writ of error.

The case has been fully presented in argument upon its merits, as they appear from the finding; but as we consider ourselves obliged to dismiss the writ of error, for want of jurisdiction, we have considered no other question.

This question is anticipated by the counsel for the plaintiff in error, who, while admitting that the amount sued for, and for which judgment was recovered, is less than five thousand dollars, yet maintains that the value of the matter in dispute is in excess of that sum, because the defendants in error being the holders and owners of the bonds, to the amount of seven thousand five hundred dollars, have obtained, by the present judgment, an adjudication, conclusive upon the plaintiff in error, as an estoppel, of its liability to pay the entire amount of the principal sum.

It is true that the point actually litigated and determined in this action was the validity of the bonds, and as between these parties, in any subsequent action upon other coupons, or upon the bonds themselves, this judgment, according to the principles stated in *Cromwell v. County of Sac*, 94 U. S. 351, might, and as to all questions actually adjudged would, be conclusive as an estoppel.

And accordingly the plaintiff in error, in support of the jurisdiction of this court, relies on what was said in *Troy v. Evans*, 97 *Id.* 1, that, “*prima facie*, the judgment against a defendant in an action for money is the measure of our jurisdiction in his behalf. This *prima facie* case continues until the contrary is shown; and if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount.” The point was not involved in the decision of that case, as the writ of error was in fact dismissed; and what was said, in the opinion, seems to have been rather intended as a concession for the sake of argument, than as a statement of a conclusion of law. The inference now sought to be drawn from it we are not able to adopt. In our opinion, Sections 691 and 692, Revised Statutes, which, as amended by

Section 3 of the Act of February 16, 1875, c. 77, limit the jurisdiction of this court, on writs of error and appeal, to review final judgments in civil actions, and final decrees in cases of equity and of admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decrees ought to be reviewed, has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. *Lee v. Lee*, 8 Pet. 44; *Barry v. Mercin*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black, 271; *Sparrow v. Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction can not be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions.

Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. *Williamson v. Kincaid*, 4 Dall. 20; *Course v. Stead*, *Id.* 22; *United States v. Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record, as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case, unless its right and duty to do so are apparent upon the face of this record.

The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or

suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties; and yet, before the principal sum, in the present case, or any future installments of interest shall have become due, the bonds may have been transferred to a stranger, for or against whom the present judgment would not be evidence. And in every such case it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to the suit, but also, whether and in what circumstances, and to what extent, the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies, that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

Accordingly, this court has uniformly been strict to adhere to and enforce it.

In *Grant v. McKee*, 1 Pet. 248, it refused to take jurisdiction, because the value of the premises, the title to which was involved in that action, was less than the jurisdictional limit, although they were part of a larger tract, held under one title, on which the recovery in ejectment had been obtained against several tenants, whose rights all depended on the same questions.

Stinson v. Dousman, 20 How. 461, was an action at law for the recovery of rent, where the claim and judgment against the defendant below were less than the amount required to give this court jurisdiction on a writ of error; but in giving judgment for the plaintiff below, for any sum at all, the court necessarily passed upon a defense of the defendant, set up by way of answer in the nature of a counterclaim, insisting upon an equitable right to a conveyance of the land, out of which it was alleged the rent issued, and the value of which was in excess of the limit required for the jurisdiction of the court. The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was, not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld.

Gray v. Blanchard, 97 U. S. 564, and *Tintsmen v. National Bank*, 100 *Id.* 6, are instances of the strict application of the rule limiting the jurisdiction to the amount actually in dispute in the suit; of which a similar example is found in *Parker v. Morrill*, *ante*, page 1, decided at the present term.

Indeed, so strictly has it been applied, that, in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. We have had occasion to repeat and apply this principle in several cases at the present term. *Ex parte Baltimore & Ohio Railroad Co.*; *Schwed v. Smith*; *Farmers' Loan & Trust Co. v. Waterman*; *Adams v. Crittenden*, *ante*, pp. 5, 188, 265, 576. In some of these cases, the value of the matter in dispute, actually determined against the party invoking our appellate jurisdiction, actually was largely in excess of its limit, and yet its exercise was forbidden, because it was divided into distinct claims, no one of which was sufficient of itself to entitle either party to an appeal, although the decision in one was necessarily the same in all, because rendered upon precisely the same state of facts. *Russell v. Stansell*, 105 U. S. 303.

To entertain jurisdiction in the present case would be, in our opinion, to unsettle the principle of construction by which, in all the cases referred to, this court has been guided. The writ of error is accordingly *dismissed for want of jurisdiction*.

In *Hilton v. Dickinson*, 108 U. S. 165, at p. 175, Mr. C. J. Waite, delivering the opinion of the court, says: "Under this rule we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counterclaim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed."

The authorities are reviewed in this opinion.

See, also, *New York Elevated R. R. v. Fifth National Bank*, 118 U. S. 608, holding that jurisdictional amount on appeal is the judgment below, not the verdict.

The defendant may appeal where his counterclaim for more than the jurisdictional amount has been allowed, regardless of plaintiff's judgment. *Block v. Darling*, 140 U. S. 234.

For a review of the acts of congress relating to the jurisdictional amount, holding that under the Act of 1888 no amount was necessary in a suit in which the United States was a plaintiff, see *United States v. Sayward*, 160 U. S. 493.

WALTER v. NORTHEASTERN RAILROAD COMPANY,

Reported in 147 U. S. 370.

(1893.)

THIS was a bill in equity filed by the Northeastern Railroad Company of South Carolina against the treasurer and sheriff of Charleston, Berkeley, Williamsburg and Florence counties, through which the plaintiff's road passes, to enjoin them from issuing executions against or seizing the property of the plaintiff for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void.

The substance of the bill was that the constitution of the state provided for a uniform and equal rate of assessment and taxation; that real estate is assessed for taxation once in five years at a uniform rate of from fifty to sixty per cent. of its

actual value; that personal property is assessed every year at the same rate or less; that this rate has become a uniform rule, and was accepted and acted upon by the assessing officers and boards of the state; that plaintiff returned its property at a valuation of from sixty to sixty-five per cent. of its actual value; and that the state board of equalization for railroads arbitrarily assessed the property of this company at a much higher rate, although, prior to the year 1891, it had accepted and acted upon a uniform rule of assessment; but that, at its meeting in 1891, it abandoned the rule theretofore accepted, and assessed railroad property at a rate exceeding its actual value, and in some cases doubled and trebled the previous rate, with intent to cast upon it a greater proportion of taxation, although no change was made in the assessment of other real and personal property; that the plaintiff, in common with the other railroads of the state, tendered in payment of its taxes the amount due under the levy estimated upon the value of its property as theretofore assessed, under the rule prevailing in that state, and set forth in its sworn return; and brought this bill to enjoin the taking possession of or selling its property under a tax execution to collect the excess.

Defendants demurred to this bill upon the ground: 1. That the court had no jurisdiction by reason of the insufficient amount in controversy. 2. That the plaintiffs had a complete and adequate remedy at law. 3. For want of equity. The case was heard upon this demurrer, and a decree was rendered overruling the demurrer and enjoining the collection of the taxes. See *Richmond, etc., Railroad v. Blake*, 49 Fed. Rep. 904. Defendant appealed to this court under the fifth section of the Court of Appeals Act of March 3, 1891, 26 Stat. 826, 827, c. 517.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court: Objection was taken to the jurisdiction of the court below upon the grounds, first, that the matter in controversy with each of the defendants was less than two thousand dollars; and second, because the plaintiff had a complete and adequate remedy at law.

With regard to the amount in controversy, it is averred in the bill that the plaintiff returned, as required by law, its real and personal property for taxation at a "valuation of the same

according to and under the uniform rules and methods of valuation adopted for the taxation of similar real and personal property," and tendered to the county treasurers of the several counties the amounts due for taxes upon such valuation as returned, such amount aggregating over eighteen thousand dollars, and, in addition thereto, tendered to the county treasurer of Charleston county, eight hundred and thirteen dollars eighty-seven cents, for the expenses of the railway commission, but that the defendants refused to receive the same unless plaintiff would also pay the taxes claimed to be due in excess of the amount so tendered, which were as follows: In Charleston county, \$177.67; in Berkeley county, \$1,511.16; in Williamsburg county, \$1,332.50; and in Florence county, \$571.33; making the total amount claimed \$3,592.66. It was further alleged that of these taxes, $4\frac{3}{4}$ mills were levied for state purposes; 2 mills for school purposes; and from $1\frac{7}{8}$ to $5\frac{3}{4}$ mills in the different counties, for county and all other purposes. It appears, then, that, while the total amount involved in this litigation is \$3,592.66, there is no claim made by the county treasurer of either county which is not less than \$2,000, and that of the entire claim of \$3,592.66, the state taxes represent but \$1,473.38. The residue is assessed for school and local purposes, is disbursed by the county commissioners, and is never paid into the state treasury at all. In short, the amount in dispute in each county is not only less than \$2,000, but is compounded of a state, school and county tax, most of which is collected and paid out by the county authorities for local purposes.

Under these circumstances, it is entirely clear that, had these taxes been paid under protest and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some states, a chancery subpoena to be served in any county of the state, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county.

Is the plaintiff entitled to join them all in a single suit in a federal court, and sustain the jurisdiction by reason of the fact

that the total amount involved exceeds \$2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in *Seaver v. Bigelows*, 5 Wall. 208; *Russell v. Stansell*, 105 U. S. 303; *Farmers' Loan and Trust Co. v. Waterman*, 106 U. S. 265; *Hawley v. Fairbanks*, 108 U. S. 543; *Stewart v. Dunham*, 115 U. S. 61; *Gibson v. Shufeldt*, 122 U. S. 27; *Clay v. Field*, 138 U. S. 464.

As illustrative of the rule as applied to cases of joint defendants, it was held in *Stratton v. Jarvis*, 8 Pet. 4, that, where a libel for salvage was filed against several packages of merchandise, and a decree was rendered against each consignment for an amount not sufficient in itself to authorize an appeal by any one claimant, the appeal of each claimant must be treated as a separate one, and, the amount in each case being insufficient, this court had no jurisdiction of the appeal of any claimant. A similar ruling was made in *Spear v. Place*, 11 How. 522. In *Paving Co. v. Mulford*, 100 U. S. 147, a bill, filed against two defendants, alleging that each held certificates of indebtedness belonging to the plaintiff, was dismissed on final hearing, and plaintiff appealed, and it was held that, as the recovery, if any, must be against the defendants severally, and as the amount claimed from each did not exceed the requisite sum, this court had no jurisdiction. In *Schwed v. Smith*, 106 U. S. 188, 190, certain creditors recovered separate judgments against a debtor amounting in the aggregate to more than \$5,000, but none of which exceeded that sum, and filed a bill against him and a preferred creditor to subject to the payment of their judgments goods which had been seized upon a prior judgment, in which they succeeded, and defendant appealed. The appeal was dismissed, the court holding that if the decree were several as to the creditors, it was equally so as to their adversaries. "The theory is, that, although the proceeding is in form but one

suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." So in *Henderson v. Wadsworth*, 115 U. S. 264, it was held that where a suit was brought against several heirs to enforce their liability for the payment of a note on which their ancestor was bound, and separate judgments were rendered against each for his proportionate share, this court had jurisdiction in error only over such judgments as exceeded \$5,000; and, again, in *Ex parte Phoenix Ins. Co.*, 117 U. S. 367, that distinct decrees there were distinct liabilities, could not be joined to give this court jurisdiction on appeal. In that case the suit was brought upon a single policy of insurance written by four different companies, and the decree was against each company severally for its separate obligation.

In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff. The disposition we have made of this question renders it unnecessary to consider the others.

Upon the whole, we are of opinion that this bill ought not to have been sustained, and the decree of the court must, therefore, be reversed, and the case remanded, with directions to dismiss the bill for want of jurisdiction.

TROY BANK v. WHITEHEAD.

Reported in 222 U. S. 39.
(1911.)

MR. JUSTICE VAN DEVANTER delivered the opinion of the court: This was a suit in equity wherein the jurisdiction of the circuit court was invoked on the ground of diverse citizenship, and the sole question now presented for decision is whether the sum or value of the matter in dispute exceeded two thousand dollars, exclusive of interest and costs, as required by the Act of August 13, 1888, c. 866, Section 1, 25 Stat. 433. The facts are these:

Upon a sale of land situate in the western district of Kentucky, the vendor lawfully reserved a vendor's lien for the unpaid portion of the purchase price, for which he took two promissory notes of \$1,200 each, payable in one and two years. Shortly

thereafter the notes were assigned to the present appellants, one to each; and by the law of Kentucky the vendor's lien passed to the assignees, as a common security for the payment of both notes, without any priority of right in either assignee. After the maturity of the notes, both remaining wholly unpaid, the assignees jointly brought this suit to enforce the vendor's lien. They and their assignor were citizens of Indiana, and the defendant, who acquired the land with notice of the lien, was a citizen of Kentucky.

By a demurrer to the bill the defendant challenged the jurisdiction of the circuit court, upon the ground that the matter in dispute was not of the requisite jurisdictional value; and the court, being of opinion that such value was not to be measured by the extent to which the plaintiffs collectively were seeking to enforce the lien as a common security, but by the extent to which each was interested in its enforcement, sustained the demurrer and dismissed the bill for want of jurisdiction. 184 Fed. Rep. 932. The plaintiffs then appealed directly to this court, and the circuit court appropriately certified the question of jurisdiction. Act of March 3, 1891, c. 517, Section 5, 26 Stat. 826.

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields v. Thomas*, 17 How. 3; *Rodd v. Heartt*, 17 Wall. 354; *Davies v. Corbin*, 112 U. S. 36, 40; *Gibson v. Shufeldt*, 122 U. S. 27; *New Orleans Pacific Railway Co. v. Parker*, 143 U. S. 42; *Walter v. Northeastern Railroad Co.*, 147 U. S. 370, 373; *Davis v. Schwartz*, 155 U. S. 631, 647; *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28.

The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claims under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and

the lien was sought to be enforced as a common security for the payment of both notes.

It follows that the circuit court erred in holding that it was without jurisdiction; and its decree is accordingly reversed, with directions to overrule the demurrer to the bill and to take such further proceedings in the case as may be appropriate.

As to the effect of the *ad damnum* clause of the declaration upon the existence of the jurisdictional amount, see *Barry v. Edmunds*, 116 U. S. 550, and *North American Co. v. Morrison*, 178 U. S. 262.

In *Sherman v. Clark*, Fed. Cas. 12763 (3 McLean, 91), the rule is laid down that in a suit against an endorser on a promissory note, the damages laid in the writ determines the amount in controversy, not the amount of the debt as proved.

As to joining claims of plurality of claimants, see *Bateman v. Southern Oregon Co.*, 217 Fed. 933, holding that claimants of separate tracts of land, although under the same act of congress, can not unite to produce the jurisdictional amount, in determining the validity of their claims; and *In re Metropolitan Railway Receivership*, 208 U. S. 90, in which it is held that where defendant of one state admits indebtedness to plaintiff of another state and joins in a request for a receiver, there is nevertheless such controversy as is cognizable in the federal courts, inasmuch as the amount claimed is not paid, and if a sufficient sum is claimed jurisdiction exists.

ANDERSON v. W. U. TELEGRAPH CO.

Reported in 218 Federal, 78.

(1914.)

AT LAW. Action by W. M. Anderson against the Western Union Telegraph Company. On motion to remand. Sustained.

This action was instituted in a state court to recover damages in the sum of \$5,000; the writ being returnable to the fall term of that court, which began on the 19th day of October, 1914. The statutes of the state of Arkansas require a defendant, when served with process ten days before the commencement of the term, to plead on or before the third day of that term. On the 17th day of October, 1914, the defendant, a nonresident corporation (the plaintiff being a citizen of the state of Arkansas), served notice in writing on the attorney for the plaintiff that on the 19th day of October, 1914, it would file its petition and bond for removal of the cause to the United States district court for the district in which the cause was then pending,

and of which plaintiff was a resident. After service of this notice, but on the same day, and before the petition and bond for removal were filed, and before the defendant had filed its answer, plaintiff, without notice to the defendant, amended his complaint by interlineation, reducing his claim to below \$3,000.

Section 6143, Kirby's Digest of the Statutes of Arkansas, provides: "The plaintiff may amend his complaint without leave at any time before an answer is filed, and without prejudice to the proceedings already had."

On the day specified in the notice, and which was within the time the defendant was, under the laws of the state, required to plead, but after the amendment had been made, it filed in the state court its petition and bond for removal, which are in proper form, showing the necessary diversity of citizenship, and that the amount involved was \$5,000, disregarding the amendment which reduced the claim. The state court, against the objections of the plaintiff, granted the petition, and, the record having been filed in this court within the time prescribed by Section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1913, Sec. 1011]), the plaintiff has moved to remand the cause, upon the ground that at the time the petition and bond for removal were filed the amount involved in the action did not exceed in value the sum of \$3,000, exclusive of interest and costs.

TRIEBER, District Judge (after stating the facts as above): As this question has never been determined by any court in a published opinion, no notice of the intention to ask for a removal of a cause having been required before the enactment of the Judicial Code, it is deemed proper, for the guidance of attorneys in this district, until the appellate courts have authoritatively settled it, to file an opinion.

(1) The law as uniformly declared is that the right of removal has to be determined from the facts as they appear from the pleadings at the time the petition and bond are filed (*Chicago, B. & O. Ry. Co. v. Williard*, 220 U. S. 413, 426, 31 Sup. Ct. 460, 55 L. Ed. 521), and, if in proper form, the jurisdiction of the state court ceases immediately, except for the purpose of making the order of removal. All subsequent proceedings in the cause by the state court are *coram non judice* and absolutely void.

Flint v. Coffin, 176 Fed. 872, 100 C. C. A. 342; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 653, 68 C. C. A. 288, 291, and authorities there cited (approved in *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 373, 29 Sup. Ct. 366, 53 L. Ed. 551).

(2) In the case at bar it appears from the complaint, after it had been amended, that at the time of the filing of the petition and bond for removal the amount involved was not sufficient to confer jurisdiction on a national court. It is claimed on behalf of the defendant that, as the amendment was made after the service of the notice of the intended application for removal, it was for the sole purpose of preventing a removal; that this was a fraud on the defendant, for the purpose of depriving it of a right granted by the laws of the United States; and for this reason the court should disregard the amendment and treat the cause as it appeared from the complaint at the time the notice of the intention to remove it was served on counsel for the plaintiff.

Ordinarily it can not be doubted that it is for the plaintiff to determine what damages he thinks he is entitled to, and if he sees proper to be satisfied with a smaller sum than he originally thought he should recover he has a right to reduce his claim, provided it was before the state court had lost jurisdiction of the cause. The fact that his object in reducing his claim was to prevent a removal is immaterial, unless he has lost control of his action after notice of the defendant's intention to remove the cause to the national court. It has been uniformly held that a party may change his citizenship for the sole purpose of enabling him to maintain an action in a national court, provided the change is actually made. The motive is immaterial. *Cheever v. Wilson*, 9 Wall. 108, 123, 19 L. Ed. 604; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 192, 20 Sup. Ct. 311, 44 L. Ed. 423; *Williamson v. Osenton*, 232 U. S. 619, 625, 34 Sup. Ct. 442, 58 L. Ed. 758.

In *Blair v. Chicago*, 201 U. S. 400, 448, 26 Sup. Ct. 427, 434 (50 L. Ed. 801), it was sought to deprive a national court of jurisdiction upon the ground that there was a conspiracy to get the case into a national court; but the court, in disposing of that contention, said:

“As to the conspiracy to get the case into the federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justifiable demand from seeking the federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the federal courts, and in such cases the motive of the creditor in seeking federal jurisdiction is immaterial.”

It has been frequently held that if the plaintiff has a cause of action which is joint, and has elected to sue both tortfeasors in one action, even if it was for the purpose of preventing a removal to the national court, his motive in doing so is of no importance. *Chicago, R. I. & P. Ry. Co. v. Dowell*, 229 U. S. 102, 114, 33 Sup. Ct. 684, 57 L. Ed. 1090, and cases cited there.

While decisions of the supreme court affecting its jurisdiction on error to the circuit or district courts are not exactly in point, they are at least helpful. Prior to the enactment of the Circuit Court of Appeals Act (26 Stat. 824) the jurisdiction of the supreme court was limited, with some exceptions which are immaterial so far as the issues in this case are concerned, to final judgments exceeding in value the sum of \$5,000, exclusive of costs, and it was uniformly held that, although the judgment exceeded that amount, the judgment creditor had a right to remit all in excess of \$5,000, even if his motive was to prevent an appeal, and after such *remittitur* the supreme court was without jurisdiction. *Thompson v. Butler*, 95 U. S. 694, 24 L. Ed. 540; *Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. Ed. 915; *Pacific Postal Tel. Co. v. O'Connor*, 128 U. S. 394, 9 Sup. Ct. 112, 32 L. Ed 488; *Texas & Pacific Ry Co. v. Horn*, 151 U. S. 110, 14 Sup. Ct. 259, 38 L. Ed. 91.

While in the first case cited the court had only decided that the *remittitur* could be made after verdict and before judgment on the verdict had been entered, in the other cases it was expressly held that the *remittitur*, even if made after entry of judgment on the verdict, would deprive the supreme court of jurisdiction.

In *Peterson v. Chicago, M. & St. P. Ry. Co.* (C. C.), 108 Fed. 561, Judge Philips held that an amendment of the complaint made in vacation, without notice, and before the petition for removal was filed, reducing the amount claimed below the sum necessary to invest the national court with jurisdiction, was ineffectual. But that case is clearly distinguishable from the case at bar. The statute of Missouri, from a court of which state that cause was removed, required notice of the filing of an amendment to a pleading in vacation to the adverse party, and "until such notice is duly served such adverse party shall not be deemed to have notice thereof for the purpose of pleading," and the learned judge held that, the amendment having been made in vacation without notice, it was under the statute of Missouri a nullity. But under the statutes of the state of Arkansas, and the uniform practice in the courts of that state, an amended pleading may be filed before answer in vacation, without notice to the adverse party, with the same effect as if made in term time.

As the complaint, at the time the petition and bond for removal were filed, showed the amount in the controversy did not exceed \$3,000, the cause was not removable, and the motion to remand is sustained.

Also, see *Glenwood Co. v. Mutual Co.*, 239 U. S. 121, where it said that the jurisdictional amount in suit to restrain nuisance or continuing trespass is value of object to be gained by complainant, and the value of right of complainant to maintain and operate its telephone plant and conduct its business free from interference by defendants in so erecting wires, poles, etc.; as to interfere with complainant's poles, etc. It is not the cost of removing poles, wires, etc., where they interfere.

See notes to *Auer v. Lombard*, 19 C. C. A. 73; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455; *Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 285.

d. Jurisdiction because of the subject-matter—Federal question.

BOLLING v. LERSNER.

Reported in 91 U. S. 594.

(1875.)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: The circuit court of Fauquier county, Va., rendered a decree

in this cause September 13, 1867. From this decree Lersner prayed an appeal to the district court of appeals, May 17, 1869. This was allowed by W. Willoughby, judge. Upon this allowance the appeal was docketed in the appellate court, and the parties appeared without objection or protest, and were heard. Upon the hearing, the decree of the circuit court was reversed, and the cause remanded with instructions to proceed as directed. When the case came to the circuit court upon the mandate of the appellate court, Bolling appeared and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the judge who allowed the appeal, had been appointed to his office by the commanding general exercising military authority in Virginia under the reconstruction acts of congress, and that those acts were unconstitutional and void. This objection was overruled, and a decree entered according to the mandate. From this decree Bolling took an appeal to the supreme court of appeals, where the action of the circuit court was affirmed. To reverse this decree of affirmance the present writ of error has been prosecuted.

We can not re-examine the judgment or decree of a state court simply because a federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In this case, Bolling presented to the court for its determination the question of the constitutionality of the reconstruction acts. This was a federal question; but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause. While it, perhaps, sufficiently appears that the judge was appointed under the authority of the acts in question, it also appears that he was acting in the discharge of the duties of his office, and that he had the reputation of being the officer he assumed to be. It also appears, that, after the allowance of the appeal, the case was docketed in the appellate court; that Bolling appeared there; that he submitted himself to the jurisdiction of that court without objection, and presented his case for

adjudication; that the case was heard and decided; and that the objection to the qualification of the judge who allowed the appeal was made for the first time in the circuit court, when the case came down with the mandate.

From this it is clear that the case might have been disposed of in the state court without deciding upon the constitutionality of the reconstruction acts. Thus, if it was held that the objection of the authority of the judge came too late, or that the allowance of an appeal by a judge *de facto* was sufficient for all the purposes of jurisdiction in the appellate court, it would be quite unnecessary to determine whether the judge held his office by a valid appointment. We might, therefore, dismiss the case, because it does not appear from the record that the federal question was decided, or that its decision was necessary.

But if we go farther, and look to the opinion of the court, which, in this case, has been certified here as part of the record, we find that the federal question was not decided. All the judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office. In this the court but followed its own well-considered holding, by all the judges, in *Griffin v. Cunningham*, 20 Gratt, 31, approved in *Quinn v. Cunningham*, *Id.* 138, and *Teel v. Young*, 23 *Id.* 691, and the repeated decisions of this court. *Texas v. White*, 7 Wall. 733; *Thorington v. Smith*, 8 *Id.* 8; *Huntington v. Texas*, 16 *Id.* 412; *Horn v. Lockhart*, 17 *Id.* 580. *Writ dismissed for want of jurisdiction.*

STARIN v. NEW YORK.

Reported in 115 U. S. 248.

(1885.)

THESE were appeals from orders of the circuit court remanding a suit which had been removed from a state court under the Act of March 3, 1875, ch. 137, 18 Stat. 470. The questions to be decided arose on the following facts:

The mayor, aldermen and commonalty of the city of New York, a municipal corporation of the state of New York, commonly called the city of New York, brought a suit in equity on or about the 11th of August, 1884, in the superior court of

the city of New York, against John H. Starin, Independent Steamboat Company, Starin's City, River and Harbor Transportation Company of New York, New York and Staten Island Steamboat Company, David Manning, Franklin Wilson, William Clark, John G. Belknap, James B. Corwin, Max Golden, Samuel Underhill, and Frank Smith, to restrain them from using and employing the steam ferry-boats Pomona, D. R. Martin, Laura M. Starin, and Castleton, or any other vessel or vessels of any kind, for and in the transportation of persons, animals, vehicles, freight, goods and chattels from or to Pier No. 18, North river, or from or to any place in Manhattan Island, to or from certain landing places on the shore of Staten Island, without the license or permission of the plaintiffs; and also for an account of moneys received by the defendants, or any or either of them for such transportation. Both Manhattan Island and Staten Island are in the state of New York. The cause of action as stated in the complaint was, that the city, under its charter, granted originally January 15, 1730, by the province of New York, and since confirmed by the state of New York, has the exclusive right of establishing ferries from Manhattan Island to the opposite shores, in such and so many places as the common council may think fit; that the defendants, without the permission of the city, had set up and were maintaining a ferry between Manhattan Island and certain landing places on Staten Island, and for that purpose employed the boats above named; that the defendant Starin was the owner of the Castleton and the D. R. Martin, and the person chiefly interested in Starin's City, River and Harbor Transportation Company of New York, which owns the Laura M. Starin, and in the New York and Staten Island Steamboat Company, which owns the Pomona; that while the business was done in the name of the Independent Steamboat Company, that company was organized and incorporated through his instrumentality and his interest, and was composed of but three persons, all of whom were in his employ and under his control; that the incorporation of the company was a device for his own personal benefit; and that he was in fact the person actually operating the ferry. The certificate of incorporation, a copy of which was attached to the complaint, showed that

the company was organized under the laws of New Jersey, July 26, 1884, with a capital of \$5,000, divided into five hundred shares of \$10 each, all owned by three persons, for the transportation of persons and property upon water as common carriers for hire; that the principal part of the business of the company in New Jersey was to be transacted in Jersey City; and that the business out of that state was to be done in the cities of New York and Brooklyn and the several villages, landing places, cities and towns on the Hudson river, Staten Island, and Long Island, in New York, accessible by water.

The defendants Starin, Independent Steamboat Company, Starin's City, River and Harbor Transportation Company, and New York and Staten Island Steamboat Company each filed a separate answer to the complaint. All the other defendants, who were the masters or pilots or engineers employed in running the several boats, united in one answer.

The answers all contained substantially the same defenses. They admitted the ownership of the boats as set forth in the complaint, except that it was alleged the Castelton belonged to the New York and Staten Island Steamboat Company instead of Starin. They admitted the charter of the city, with words purporting to grant certain rights as to the establishment of ferries from Manhattan Island to the opposite shores, but denied that this grant extended to ferries between New York and that part of Staten Island which borders upon the Kill von Kull. They admitted that the several boats mentioned in the complaint were run at stated times by the Independent Steamboat Company, under the management of the masters and engineers, without the license or permission of the city, for the transportation of persons and property between Pier 18, North river, which is on Manhattan Island, making certain landing places on the shore of Staten Island, making daily fourteen trips, or thereabouts, but they denied that, in so doing, the company either operated a ferry or usurped any franchise belonging to the city. They also denied the allegations in the complaint as to the connection of the defendant Starin with the Independent Steamboat Company, and denied that Starin was the person who was actually operating the boats.

The answers then alleged, "as a matter of special defense under the laws of the United States:"

1. That the Independent Steamboat Company was a corporation, organized and incorporated under the laws of New Jersey, for the purpose of transporting persons and property by water, as a common carrier for hire, in and over the waters of the Hudson river, Kill von Kull, Raritan bay, and their tributaries, between places on such waters in New York and New Jersey, including Staten Island and Long Island, and the cities of New York and Brooklyn; that the company chartered the boats in question from the several owners thereof, and leased wharves and landing places in New York and on the shore of Staten Island bordering on the Kill von Kull, for the purpose of engaging in the business of transportation by water between such wharves and landings.

2. That all the boats in question were enrolled and licensed under the laws of the United States for carrying on the coasting trade, as vessels of the United States, and that the individual defendants described as masters or engineers on the boats are all licensed under the laws of the United States to act as masters or pilots, or as engineers, on steam vessels upon the waters traversed by the boats in question.

3. That for a number of years terminating in 1874 steamboats, similar to those operated by the company, and doing a transportation business similar to that in which the company is engaged, had been without any license or permission from the city, navigated from Pier 18, New York, to the landing places on Staten Island made use of by the company, and back; that large sums were realized therefrom, and that since 1874 this business has greatly increased.

4. That the waters of the Hudson river or bay of New York, and the Kill von Kull, are waters of the United States, and public and common highways of interstate and international commerce; that the steamboats as operated by the company do not constitute a ferry within the meaning of the laws of the United States, or of the state of New York, or of the city charter, but that the city seeks, under the cover of its charter and by this suit, to establish in itself, as and for a monopoly and as private property, the ownership of all rights to carry

on commercial intercourse, consisting in the daily or regular interchange or transportation of passengers and property between Manhattan and Staten Islands, over such waters, and to obstruct the navigation of such waters, although carried on by citizens of the United States in steam vessels duly enrolled and licensed under the laws of the United States, and navigated by masters, pilots and engineers duly licensed under the laws of the United States, thus practically nullifying the laws of the United States regulating commerce and navigation.

After the answers were filed two petitions were presented for a removal of the suit to the circuit court, one by all the defendants, on the ground that the suit was one arising under the constitution and laws of the United States, and the other, by the Independent Steamboat Company alone, on the ground that there was in the suit a controversy wholly between that company and the city as to whether the company "had or had not the right to use and operate its steamboats" in the way contended for, and that this controversy could be fully determined as between them.

A copy of the record in the state court having been filed in the circuit court of the United States, that court remanded the cause, and thereupon these appeals were taken, one by all the defendants, and the other by the Independent Steamboat Company alone. The two appeals were docketed in this court separately.

MR. CHIEF JUSTICE WAITE delivered the opinion of the courts. After stating the facts in the language reported above he continued:

We will first consider whether the suit is one which arises under the constitution or laws of the United States; for, if it is not, the order to remand was right, so far as the removal upon the application of all the defendants is concerned.

The character of a case is determined by the questions involved. *Osborn v. Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the

United States, within the meaning of that term as used in the Act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohens v. Virginia*, 6 Wheat. 264, 379; *Osborn v. Bank of United States*, 9 Wheat. 737, 824; *The Mayor v. Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas Pacific v. Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co. v. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

The questions in this case, as shown by the pleadings, are, 1, whether the city of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull; and, if it has, then, 2, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry. The determination of these questions depends, 1, on the construction of the grant in the charter of the city; and 2, on the character of the business in which the defendants are engaged. It is not contended that there is anything either in the constitution or the laws of the United States which takes away the right from the city, if it was in fact granted by the original charter before the revolution: or which defines what a ferry is or shall be, or provides that enrolled and licensed steamboats, managed by licensed officers, may be run on the public waters as ferry-boats, without regard to grants that may have been made by competent authority of exclusive ferry privileges; and that is not the defense set up in the answers in this case. The question here is as to the extent of the ancient grant made to the city, not as to the rights of the defendants in the navigation of the waters of the United States irrespective of this grant.

It is not pretended that the United States have in any manner attempted to interfere with the power of a state to grant exclusive ferry privileges across public waters between places within its own jurisdiction. No attempt is made by the city to control the use of the licensed and enrolled vessels of the defendants or their licensed officers, in any other way than by preventing them from running as a ferry between the

points named. They may run as they please, and engage in any business that may be desirable, not inconsistent with the exclusive ferry rights of the city. The claim of the city is based entirely on its charter, and it seeks in its complaint to control only that part of the navigation of the public waters in question which is connected with the establishment and operation of ferries between New York and the specified landing places on Staten Island. Although the prayer for judgment when taken by itself may appear to go further, it must be construed in connection with the cause of action as stated in the complaint, and limited accordingly. The defense is that the defendants are not operating a ferry within the meaning of the charter, or, if they are, that it is not such a ferry, as comes within the monopoly of the city. If they are not operating such a ferry, or if they are, and it appears that the monopoly granted to the city does not include ferries between New York and Staten Island on the Kill von Kull, they must prevail in the final determination of the suit. The decision of these questions does not depend on the constitution or laws of the United States. There is nothing in the constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants, or in another sustain them.

GERMANIA INS. CO v. WISCONSIN.

Reported in 119 U. S. 473.

(1886.)

THIS was a writ of error brought under Section 5 of the Act of March 3, 1875, c. 137, 18 Stat. 470, for the review of an order of the circuit court remanding a suit which had been entered in that court as a suit removed from a state court. The record showed a suit brought by the state of Wisconsin, in one of its own courts, against the Germania Insurance Company of New Orleans, an insurance company incorporated by the state of Louisiana, and having its principal office and place of business in New Orleans, to recover certain statutory penalties for doing business in Wisconsin without complying with the laws of that state in reference to foreign insurance companies. The only process in the cause was served, December

29, 1885, on L. D. Harmon, a citizen of Wisconsin, and described in the sheriff's return as "being then and there an agent of the said defendant."

On the 12th of April, 1886, the insurance company came, and entering "its special appearance in the action * * * for the purpose of this motion only," moved the court "to vacate and set aside the pretended service of summons" as above stated, "and all and every proceeding in said action subsequent thereto, for want of jurisdiction, and irregularity in said pretended service of process." In support of this motion an affidavit of the vice-president and of the secretary of the company was filed, to the effect that Harmon was never the agent of the company, and that the company had no agent in the state and had had no agent, and had not transacted insurance business there for ten years then last past. Before any action was had upon this motion, the company, on the same 12th of April, presented to the court its petition for the removal of the suit to the circuit court of the United States for the eastern district of Wisconsin, in which was set forth the motion to set aside the service of the summons in the action and the special appearance of the company for the purposes of that motion only, and the grounds of the motion. The petition then stated, "that the suit arises out of a controversy between the parties in regard to the operation and effect of certain provisions of the laws of the state of Wisconsin, said to be in conflict with the constitution of the United States in various particulars, and necessitating a construction thereof, among which subjects of controversy are the following, to wit:

"Whether the attempt of the state to prevent the company from doing business in the way it was done was not in conflict with Section 1, Article 14, and with Section 8, Article 1, of the constitution; and

"Whether the aforesaid proceedings in said court, and the attempt to proceed against your petitioner by service of summons or process upon one not authorized to represent it, without appearance in court, constitutes 'due process of law' within the meaning of the constitution of the United States."

The state court refused to allow a removal, and thereupon the company took a copy of the record to the circuit court,

where proceedings were had on the 29th of May in accordance with the following docket entry :

“The State of Wisconsin

v.

The Germania Insurance Company
of New Orleans.

}

“And comes the defendant, specially appearing by Cotzhausen, Sylvester, Scheiber & Sloan, for purposes of pending motion only, and moves the court for an order docketing this cause, which motion was granted *ex parte*; and the defendant, appearing specially for the purposes of the pending motion, gives notice that on the 7th day of June, A. D. 1886, at the opening of court on that day, or as soon thereafter as counsel can be heard,” the plaintiff will be required to show cause “why the pending motion to set aside the pretended service of summons and all subsequent proceedings in said cause should not be taken up, heard, and considered.”

On the 24th of June the circuit court remanded the cause, whereupon this writ of error was sued out.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court: A suit by a state in one of its own courts can not be removed to a circuit court of the United States under the Act of 1875, unless it be a suit arising under the constitution or laws of the United States or treaties made under their authority, *Ames v. Kansas*, 111 U. S. 449; and a suit can not be said to be one arising under the constitution or laws of the United States until it has in some way been made to appear on the face of the record that “some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or law of the United States, or sustained by an opposite construction.” *Starin v. New York*, 115 U. S. 248, 257. This record shows no such thing, for, as the case now stands, the right of recovery depends alone on the question whether service of summons has been made on a person who was at the time an agent of the company within the state on whom process might legally be served, so as to bind the company and bring it within the jurisdiction of the court. This is a mixed ques-

tion of law and fact, and in no way dependent on the construction of the constitution or any law of the United States. If decided in one way, the suit will be at an end and the company relieved from all necessity of appearing to defend. If in another, the company must appear or suffer the consequences of a default. As yet no suit arising under the constitution or laws of the United States has been *brought*, within the meaning of that term as used in the statute. There is nothing in the complaint which discloses any such case, and, until the company submits itself to the jurisdiction of the court for the trial of the suit, it can not be permitted to allege any new matter. All further proceedings have been stopped by the company on its own motion until it can be determined whether any suit at all has in law been begun so as to require the company to appear and defend. The case stands, therefore, on the summons, the alleged service, the complaint, the special appearance of the company for the purposes of its motion to vacate the service, and the petition for removal, which must be limited in its statements to such as are consistent with the special appearance which has been entered. No new matter in the nature of a defense to the action can be introduced. The only question which can be considered in the case as it now stands is whether Harmon, on whom this process was served, was in fact an "authorized agent." The suit, therefore, does not, as yet, "really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court," and it was properly remanded.

The order to that effect is consequently *affirmed*.

ROBINSON v. ANDERSON.

Reported in 21 U. S. 522.

(1387.)

THE plaintiff in error, who was plaintiff below, a citizen of California, brought suit against other citizens of the same state, to recover possession of lands in Los Angeles county, California, alleging that the action arose "under the laws of the United States and the treaty known as the treaty of Guadeloupe-Hidalgo." After answers were filed the case was dismissed for want of jurisdiction. The plaintiff sued out this

writ of error to review that judgment. The case is stated in the opinion of the court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: This is a writ of error sued out under Section 5 of the Act of March 3, 1875, c. 137, 18 Stat. 470, for the review of an order of the circuit court dismissing a suit brought by Robinson, a citizen of California, against other citizens of the same state, for want of jurisdiction. The claim on the part of the plaintiff in error is, that upon the face of the complaint it appears that the suit is one arising under the constitution, or laws, or treaties of the United States, and that consequently the circuit court had jurisdiction by reason of the subject-matter of the action; but on examination we find that, according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of the Rancho Los Bolsas, granted by the Mexican government to Manuel Nieto, and confirmed and patented to his representatives by the United States under the Act of March 3, 1851, c. 41, 9 Stat. 631, "to ascertain and settle the private land claims in the state of California." Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of confirmation, and it nowhere appears that either the constitution or any law or treaty of the United States is involved in this.

It is true that in the complaint the plaintiff alleges that the several defendants claim to be owners of parts of the Rancho Santiago de Santa Ana, adjoining the Rancho Los Bolsas on the east, granted by the Mexican government to Antonio Yorba in 1810, and confirmed and patent by the United States to Bernard Yorba and others, in 1855, and that, if the ranchos overlap, the title of the defendants is the best, because the grant of the Rancho Santiago de Santa Ana is the oldest and has precedence. He also alleges that the defendants claim "that they are 'third persons' as to whom the patents of Los Bolsas are not conclusive under the Act of" 1851, just referred to, and there are also some allegations as to the authority of the commissioner of the general land office, under the laws of the United States, to order a resurvey of the Rancho Santiago de Santa Ana, which had been once surveyed so as to exclude the premises in dispute. Many of the defendants

answered, denying that they were in possession of any portion of the premises in dispute, and others claiming that they were in possession "by and with the consent of plaintiff, made and given to defendants by plaintiff's agent, R. J. Northam, on or about the —— day of June, 1882, and not otherwise." Others claim to be in possession "in severalty under and by virtue of written contracts for the conveyance of said several tracts of land * * * by the said plaintiff to said defendants." None of the defendants in their answers claim title under the grant of the Rancho Santiago de Santa Ana.

Upon the pleadings the court dismissed the suit, evidently for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction" of that court. Such was the clear duty of the court under the Act of 1875, unless from the questions presented by the pleadings it distinctly appeared that some right, title, privilege, or immunity, on which the recovery depended, would be defeated by one construction of the constitution or some law or treaty of the United States, or sustained by an opposite construction. *Starin v. New York*, 115 U. S. 248, 257.

Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on. The circuit court can not be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made "for the purpose of creating a case" cognizable by the circuit court, when none in fact existed. The provision in Section 5 of the Act of 1875, requiring the circuit court to proceed no further, and dismiss the suit when it satisfactorily appears that, "such suit does not really and substantially involve a dispute or con-

troversy properly within'' its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complaint was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff. *The order dismissing the case is affirmed.*

Original jurisdiction where a "federal question" was involved was first conferred upon the federal courts by the Act of March 3, 1875, 18 Stat. L. 470, and has been retained since by the Statutes of 1887, 1888 and 1911.

METCALF v. WATERTOWN.

Reported in 128 U. S. 586.
(1888.)

MR. JUSTICE HARLAN delivered the opinion of the court: This action was brought in the court below, in the year 1883, to recover the sum of \$10,207.86, the amount of a judgment rendered May 8, 1866, in the circuit court of the United States for the district of Wisconsin, in favor of Pitkin C. Wright, against the city of Watertown, a municipal corporation of that state. The plaintiff in the present action, E. W. Metcalf, is a citizen of Ohio, and sues as assignee of certain named persons who became, under assignments from Wright in 1873, the owners, in different proportions, of that judgment. * * *

Nor can the jurisdiction of the circuit court be maintained upon the theory that this suit is one arising under the constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit of that character, for the plaintiff, without raising by his complaint any distinct question of a federal nature, and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown. *Provident Savings Society v. Ford*, 114 U. S. 635, 641. The plaintiff, it is true, contends that the limitation of ten years could not, consistently with the constitution of the United States, be applied to an action upon a judgment or decree of a court of the United States, when a longer period

was given within which to sue upon a judgment or decree of a court of record established by the laws of Wisconsin. And if the plaintiff properly invoked the original jurisdiction of the circuit court of the United States, in respect to the cause of action set out in his complaint, the question of limitation, under one construction of the local statute, would be decisive of the case. But is the present suit, therefore, one arising under the constitution or the laws of the United States, within the meaning of the Act of 1875? We think not.

It has been often decided by this court that a suit may be said to arise under the constitution or laws of the United States, within the meaning of that act, even where the federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the circuit court of the United States attached, by removal, clearly presented a question or questions of a federal nature. *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11; *Southern Pacific Railroad Co. v. California*, 118 U. S. 109, 112. Besides, the right of removal under the Act of 1875 could not be made to depend upon a preliminary inquiry as to whether the plaintiff had or had not the right to sue in the state court of original jurisdiction from which it was sought to remove the suit. Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdic-

tion of the circuit court. It can not retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. If the city had not answered in the present suit, and judgment by default had been rendered against it, this court, upon writ of error, would have been compelled to reverse the judgment, upon the ground that the record did not show jurisdiction in the circuit court.

It results, that from any view of the case, as presented by the record, it is one in respect to which the plaintiff could not, under the Act of 1875, invoke the original jurisdiction of the circuit court. The judgment must, therefore, be reversed, and the cause remanded with direction for such further proceedings as may be consistent with law, the plaintiff in error to pay the costs in this court. It will be for the court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction. *King Bridge Co. v. Otoe County*, 120 U. S. 225, 227; *Menard v. Goggan*, 121 U. S. 253. *Reversed*.

TENNESSEE v. BANK.

Reported in 152 U. S. 454.

(1893.)

THE first case was a bill in equity, filed January 26, 1893, in the circuit court of the United States for the western district of Tennessee, by the state of Tennessee, and the county of Shelby in that state, against the Union and Planters' Bank of Memphis, a corporation organized under the laws of Tennessee, and having its place of business at Memphis in Shelby county, and against S. P. Read and W. A. Williamson, citizens of the state of Tennessee, to recover taxes alleged to be due to the state and county for the years 1887-1891, under the general Tax Act of the state of 1887, c. 2.

The bill, after alleging that the original charter of the defendant corporation, granted by the state of Tennessee in 1858, provided "that said company shall pay to the state of Tennessee an annual tax of one-half of one per cent. on each

share of stock subscribed, which shall be in lieu of all other taxes;" and stating the provisions of the Tax Act of 1887, relied on by the plaintiffs, made the following allegations:

"The defendant bank claims that both its capital stock and the shares of stock in the hands of its stockholders are exempt from taxation by virtue of its charter. Complainants, however, are advised and submit that the exemption contained in said charter applies to the shares of stock only and not to the capital stock of said institution, and that the latter in any event is subject to the taxing power of the state."

"It may be, however, that complainants are mistaken in the foregoing construction of the charter, and that the shares of stock are taxable and the capital stock of said institution exempt. The question is one of law, and is submitted to the court for determination."

In view of the latter alternative, the bill alleged that the corporation had each year refused, on demand of the assessing officers of the state, to give them a list of its stockholders; made Williamson, a stockholder, and Read, the cashier of the bank, defendants; and required the latter to disclose on oath the names of the other stockholders and the number of their shares, in order that they might be made defendants and proper relief be had against them.

The bill also set forth the amounts of taxes due from the corporation in one alternative, or from the stockholders in the other, amounting on either view to more than \$5,000; and concluded as follows:

"Complainants further state and show that the defendant claims that under and by virtue of the terms of its charter both its shares of stock and its capital stock are exempt from taxation, excepting only the one-half of one per cent. prescribed by the charter; and that the revenue law of the state, undertaking to tax the one or the other, is void, because in violation of the clause of the constitution of the United States which forbids the state to pass any law impairing the obligation of a contract. It claims immunity from taxation upon that ground, and upon none other. The case is therefore one arising under the constitution of the United States and within the jurisdiction of this court, this bill being brought to obtain an adjudication of the question of the

exemption of the shares of stock, or of the capital stock, or both, of the defendant bank. Complainants aver that by the statute laws of the state of Tennessee they respectively have liens upon the capital stock of said bank, and upon any property in which the same may be invested, for the payment of any sums that may be adjudged due from the defendant bank on account of taxes laid on said capital stock, and liens upon the shares of stock in said bank for any taxes upon said shares that may be adjudged due thereon.

“Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that subpoena and copy issue, returnable to the next proper rule day, according to the practice of the court, requiring them to appear and answer the allegations of this bill, the defendant, S. P. Read, answering under oath and making discovery as asked in the body of the bill; that the court will construe the charter of defendant company, and pass upon the claim of immunity from taxation set up by defendant company and its stockholders, adjudging the liability of the one or the other, or both, to taxation, determining upon which the taxes are laid for the several years mentioned in the bill, rendering judgment accordingly, and enforcing the liens given by the statute laws of the state; and that the court will grant such further relief, general and special, as complainants in equity ought to have.”

The defendants filed an answer, admitting most of the facts alleged in the bill, and that the defendant corporation “claims that under and by virtue of the terms of its charter, both its shares of stock and its capital stock are exempt from taxation, excepting only the one-half of one per cent. prescribed by the charter, and that the revenue law of a state, undertaking to tax the one or the other, is void, because in violation of that clause of the constitution of the United States which forbids the state to pass any law impairing the obligation of a contract;” stating that “it does claim immunity from taxation upon that ground, but not, as alleged in the bill, upon none other;” and setting up, as additional grounds of defense, that the exemption of the corporation and its stockholders from taxation, except as provided in its charter, had been adjudicated and established by the decision of this court in *Farrington v. Tennessee*, 95 U. S. 679,

and by the decision of the supreme court of Tennessee in *Memphis v. Union & Planters' Bank*, 7 Pickle, 546; and also that they were so exempt from taxation under the constitution and laws of Tennessee; and insisting that the case was not one arising under the constitution and laws of the United States, nor within the jurisdiction of the circuit court of the United States.

The plaintiffs filed a general replication; and the court entered this decree: "This cause came on for final hearing on the pleadings and proofs, and having been argued by counsel and considered by the court, the court is of the opinion as follows, to wit: First, that the objection to the jurisdiction of the court, set up in the answer of the defendants, is not well taken, that the jurisdiction of the court should be sustained, and the cause determined on its merits; second, that by the charter of the defendant bank both the capital stock of the said bank and the shares of stock therein are exempt from taxation; third, that the defense of *res judicata* set up in the answer need not, therefore, be passed upon. It is therefore ordered, adjudged and decreed that the bill of complaint herein be, and is hereby, dismissed at the cost of complainants." The plaintiffs appealed to this court. * * *

MR. JUSTICE GRAY, after stating the cases, delivered the opinion of the court: We find it unnecessary to consider other objections to the maintenance of these three bills, or of any of them, because we are clearly of opinion that each suit is not one arising under the constitution and laws of the United States, of which the circuit court of the United States has jurisdiction, either original, or by removal from a state court, under the Act of March 3, 1887, c. 373, as corrected by the Act of August 13, 1888, c. 866, 25 Stat. 434.

The third article of the constitution, said Chief Justice Marshall, "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising

under the constitution, laws and treaties of the United States.” And “when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.” But “the right of the plaintiff to sue can not depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.” *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 823, 824. In this last clause, as the context shows, the word “then” (though printed between commas) means “at that time,” that is to say, “when the action is brought.”

The earliest act of congress which conferred on the circuit courts of the United States general jurisdiction of suits of a civil nature, at common law or in equity, “arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,” was the Act of March 3, 1875, c. 137, 18 Stat. 470. Under Section 1 of that act, providing that those courts should have original cognizance of such suits when the matter in dispute exceeded the sum or value of \$500, their jurisdiction was exercised in cases in which the plaintiff’s statement of his cause of action showed that he relied on some right under the constitution or laws of the United States. *Feibelman v. Packard*, 109 U. S. 421; *Kansas Pacific Railroad v. Atchison, etc., Railroad*, 112 U. S. 414; *New Orleans v. Houston*, 119 U. S. 265; *Bachrack v. Norton*, 132 U. S. 337; *Cooke v. Avery*, 147 U. S. 375. And under Section 2 of that act, which provided that any suit of a civil nature, at law or in equity, brought in any state court, “and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,” might be removed by either party into the circuit court of the United States, it was held sufficient to justify a removal by the defendant that the record at the time of the removal showed that either party claimed a right under the constitution or laws of the United States. *Railroad Co. v. Mississippi*, 102 U. S. 135; *Ames v.*

Kansas, 111 U. S. 449, 462; *Brown v. Houston*, 114 U. S. 622; *Provident Savings Society v. Ford*, 114 U. S. 635, 642; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Tennessee v. Whitworth*, 117 U. S. 129, 139; *Southern Pacific Railroad v. California*, 118 U. S. 109; *Bock v. Perkins*, 139 U. S. 628.

But, as has been decided under that act, "the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction;" *Carson v. Dunham*, 121 U. S. 421, 427; "a cause can not be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States;" *Gold Washing Co. v. Keyes*, 96 U. S. 199, 203; and "the question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." *Central Railroad v. Mills*, 113 U. S. 249, 257.

Even under the Act of 1875, the jurisdiction of the circuit court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in *Metcalf v. Watertown*, 128 U. S. 586, 589. * * *

The same rule applies, more comprehensively, to the acts of 1887 and 1888. In Section 1, as thereby amended, the words giving original cognizance to the circuit courts of the United States in this class of cases are the same as in the Act of 1875 (except that the jurisdictional amount is fixed at \$2,000), and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the constitution or laws of the United States. But the corresponding clause in Section 2 allows removals from a state court to be made only by defendants, and of suits "of which the circuit courts of the United States are given original jurisdiction by the preceding section," thus limiting the jurisdiction of a circuit

court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 449; *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, 687.

Congress, in making this change, may well have had in mind the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the Act of 1875. "Looking," said he, "to the reasons which have influenced congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the act of congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a federal court; for if he has pleaded and relied on such defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here." *Railroad Co. v. Mississippi*, 102 U. S. 135, 144. * * *

In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the constitution and laws of the United States. In the first and second bills, the only reference to the constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void, because in contravention of the constitution of the United States; and by the settled law of this court, as appears from the decisions above

cited, a suggestion of one party, that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under that constitution or those laws. In the third bill, no mention is made of the constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing act of congress.

The result is that, in the first and second cases, the decrees must be reversed, at the cost of the plaintiffs, and the cases remanded to the circuit court of the United States with directions to dismiss the bills for want of jurisdiction; and that, in the third case, the decree must be reversed, at the cost of the defendants, and the case remanded to the circuit court of the United States with directions to remand it to the state court from which it was removed. The costs in each case are to be borne by the party who brought into the circuit court of the United States a case not within its jurisdiction. *Torrence v. Shedd*, 144 U. S. 527; *Martin v. Snyder*, 148 U. S. 663. *Decrees reversed accordingly.*

Note the vigorous and extended dissent of Justices Harlan and Field in this case.

NASHVILLE, C., AND ST. L. RY. v. TAYLOR.

Reported in 86 Federal, 168.

(1898.)

CLARK, District Judge: * * * When the jurisdiction is founded upon the subject-matter alone, regardless of the citizenship of the parties, the case must be one arising under the national constitution or laws, or, as the common expression is, must be a case which involves a "federal question." The early provision made by congress in the Judiciary Act of 1789 (Section 12) for the removal of causes from the state courts to the courts of the United States, re-enacted in substance in Rev. St. 369, as clause 1, and continued in force until 1875, did not authorize a removal from the state courts to the courts of the United States on account of the presence in the case of a federal question. Indeed, the first act of congress which conferred on the circuit courts of the United States general jurisdiction of suits

of a civil nature at common law or in equity "arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority," was the Act of 1875 (18 Stat. 470). *Tennessee v. Union & Planters' Bank*, 152 U. S. 459, 14 Sup. Ct. 654. In this Judiciary Act of 1875 is found the explanation for the enlarged limits of federal jurisdiction, original and by way of removal, noticeable in recent years. Under the Act of 1875, which gave to the federal courts original jurisdiction of cases involving a federal question, it was held that this jurisdiction could be exercised only in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the federal constitution or laws. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35. But under Section 2 of the same act it was sufficient to justify a removal by the defendant on the same ground if the record, at the time of the removal, showed that either party claimed a right under the constitution or laws of the United States. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 14 Sup. Ct. 654.

Now, the first section of the Act of 1887 relating to the original jurisdiction of the federal courts in this class of cases, where the federal question is the ground of jurisdiction, is identical in language and effect with the corresponding section of the Act of 1875, except that the jurisdictional amount is increased; and, of course, the section in each act relating to the original jurisdiction of this court must receive the same construction. Removal of suits by defendants under Section 2 of this Act of 1887 is limited to suits "of which the circuit courts of the United States are given original jurisdiction by the preceding section." The jurisdiction of the circuit court is therefore limited on removal by the defendant to such suits as might have been instituted in that court by the plaintiff under the first section, and the effect was to change and greatly restrict jurisdiction by removal. The result is that a case not depending upon the citizenship of the parties nor otherwise specially provided for, can not be removed from a state court into a circuit court of the United States, as one arising under the constitution or laws of the United States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want can not

be supplied by any statement in the petition for removal, or any pleading subsequent to plaintiff's statement of his own claim, as might have been done under the corresponding clause in the second section of the Act of 1875. *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34. The effect is to decrease the number of cases which may be brought into this court from the state courts by removal, and to increase the number of cases which will be brought before the supreme court on writ of error in the exercise of its appellate jurisdiction over final judgments rendered by the highest courts of the states in which a federal question is involved. Under the existing Judiciary Act, jurisdiction in this court by removal is limited strictly to cases which might have been brought in this court in the first instance. This restriction, it will be observed, relates to the time and mode in which the federal question is presented, and not to the character of the question itself as being of a federal nature; that question being the same in respect of both original and removal jurisdiction. The jurisdiction of the circuit courts of the United States was, by this act, contracted in other respects, which need not be noticed, thus manifesting a tendency toward the limits of the original Judiciary Act of 1789.

Under the judicial system of the United States as now established by congress under the power conferred upon it by the constitution, the courts of the United States, besides their original jurisdiction, exercise jurisdiction in three different methods over proceedings instituted in the courts of the states, and subsequently brought before the courts of the United States: First, Cases may be removed on writ of error to final judgments rendered by the highest court of a state in cases in which there is set up or claimed a right under the constitution, laws, or treaties of the United States, and the decision of the state court is against such right. Rev. St. 709. In this class of cases the final judgments of the highest courts of the states may be re-examined and reversed or affirmed by the supreme court of the United States. Second, Cases may be removed into the circuit court of the United States from a state court under Section 2 of the Judiciary Act of 1887 "of suits of a civil nature arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,"

which has already been sufficiently referred to. Third, In the exercise of the power conferred on them, the supreme, circuit, and district courts may grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of prisoners held in custody under authority of a state in violation of the constitution, laws, or treaties of the United States, and other specified cases. *Whitten v. Tomlinson*, 160 U. S. 238, 239, 16 Sup. Ct. 297. With respect to the appellate jurisdiction of the supreme court of the United States over final judgments of the highest court of the state on writ of error, it is to be remarked that the re-examination of such judgment extends only to the federal question, and not to other issues in the case of a non-federal character, and the question must be one of law, and not of fact. *Murdock v. City of Memphis*, 20 Wall. 590; *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452; *Union Nat. Bank of Chicago v. Louisville, N. A. & C. R. Co.*, 163 U. S. 329, 16 Sup. Ct. 1039. Consequently, if the judgment of the state court was rested on grounds independent of the federal question sufficient in themselves to sustain the judgment, the writ of error will be dismissed. *Hammond v. Johnston*, 142 U. S. 73, 12 Sup. Ct. 141; *Haley v. Breeze*, 144 U. S. 130, 12 Sup. Ct. 836. The court may, of course, examine the case sufficiently to enable it to deal properly with the federal question, and to determine whether there are other grounds sufficient to support the judgment regardless of the federal question.

It is to be further observed that to sustain the original jurisdiction of this court, as well as the jurisdiction by removal of cases from a state court under Section 2 of the Judiciary Act, where the jurisdiction depends on the existence of a federal question, the suit must be one arising directly under the constitution or laws of the United States, or treaties made or which shall be made under their authority: whereas, under Rev. St. 709, the appellate jurisdiction of the supreme court of the United States extends to suits in which any right, title, or privilege is claimed under the constitution, or any treaty or statute of the United States, or under "a commission held, or authority exercised under the United States," and the decision is against such right, title, or privilege. So that the appellate jurisdiction extends to cases not only where the federal question

arises directly or primarily under the constitution, treaty, or statute, but to cases where the question arises, or is involved indirectly, or secondarily, under "a commission held or authority exercised under the United States." *Carson v. Dunham*, 121 U. S. 422, 7 Sup. Ct. 1030. The court, referring to this distinction in the case just cited, said:

"Before considering further this branch of the case, it is proper to notice the difference between the provisions of the Act of 1875 for the removal of suits presenting federal questions, and those in Section 709 of the Revised Statutes for the review by this court of the decisions of the highest courts of the states. Under the Act of 1875, for the purposes of removal, the suit must be one 'arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority;' that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction. *Starin v. City of New York*, 115 U. S. 248, 257. 6 Sup. Ct. 28, and cases there cited. But under Section 709 there may be a review by this court of the decisions of the highest courts of the states in suits 'where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privileges, or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority.' For the purposes of a removal, the constitution or some laws or treaty of the United States must be directly involved, while for the purpose of review it will be enough if the right in question comes from a 'commission held or an authority exercised under the United States.' Cases, therefore, relating to the jurisdiction of this court for review, are not necessarily controlling in reference to removals."

It is to be observed again that the distinction here pointed out, does not relate to any difference in the nature of the federal question on which jurisdiction depends, exercised in either form, but relates to a difference in the mode in which the question arises, and grows out of the more comprehensive language

employed in reference to appellate jurisdiction under Section 709 than in the Judiciary Act in which original jurisdiction is determined and defined. The class of cases, then, to which the appellate jurisdiction of the supreme court of the United States extends, is more comprehensive than the class coming within the original jurisdiction of this court by reason of the manner in which the question is presented. This is so, however, only because congress has made it so, and not because, under the definition of federal jurisdiction, as contained in the constitution, the exercise of jurisdiction in the two methods might not have been made co-extensive as to the class of cases.

In *Mayor v. Cooper*, 6 Wall. 252, Mr. Justice Swayne, giving the judgment of the court, said:

“As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The constitution must have given to the court the capacity to take it, and an act of congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of congress to act for that purpose up to the limits of the granted power. They may fall short of it, but can not exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction, within the sphere of the power, extending as well to the courts of the states as to those of the nation, is permitted. * * * The jurisdiction here in question involves the same principle, and rests upon the same foundation, with that conferred by the twenty-fifth section of the Judiciary Act of 1789.”

It has been seen that, while the appellate jurisdiction extends to a large class of cases, the actual exercise of that jurisdiction is restricted to the federal question only. On the contrary, while the original jurisdiction of this court under Section 1 of the Judiciary Act and its jurisdiction by removal under Section 2 of the same act is limited to cases in which the federal question is directly involved; when the jurisdiction does properly attach, it extends to the whole case, and to all of the issues raised,

whether of a federal or nonfederal character, and the court has power to decide upon all questions. *Osborn v. Bank*, 9 Wheat. 738; *Mayor v. Cooper*, 6 Wall. 247; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 6 Sup. Ct. 993; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437; *Railroad Co. v. Mississippi*, 102 U. S. 135. And so in a direct appeal from the final judgment of a circuit court in such cases to the supreme court of the United States the jurisdiction of that court in reviewing the judgment extends to the whole case, and that court may pass by the federal question, which gives jurisdiction, and dispose of the case upon questions of general or local law, independently of the federal question, as was done in the case of *Santa Clara Co. v. Southern Pacific R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, and *Insurance Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223. It is apparent, I think, without extending the discussion further, that in that class of cases in which a federal question is involved, and on which jurisdiction in the courts of the United States depends, the character of the question is the same, whether the jurisdiction exercised is appellate, original, or by removal, the jurisdiction in either form depending on the constitutional grant of power. In this view, decisions of the supreme court of the United States in cases brought before it from the circuit courts of the United States, and those on writ of error to the highest court of a state, are equally instructive in determining when there is a federal question, such as supports the original jurisdiction of this court as being a suit "arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority," excluding, of course, from the original jurisdiction, those which grow out of "a commission held or authority exercised under the United States," as explained in *Carson v. Dunham*, 121 U. S. 422, 7 Sup. Ct. 1030, and again in *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340. * * *

In *Shultis v. McDougal*, 225 U. S. 561, J. Van Devanter, speaking for the court, says:

1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. * * *

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction can not rest on any ground that is not affirmatively and distinctly set forth. * * *

3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. * * *

For discussion and citation of cases bearing on the subject of federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 304; *Montana Ore Purchasing Co. v. Boston, etc., Co.*, 35 C. C. A. 1; *Earnhart v. Switzler*, 105 C. C. A. 260.

Refer to these notes especially for illustrations of many instances of federal questions.

A municipal ordinance fixing a price for gas so low as to be confiscatory is in violation of the fourteenth amendment, and a suit thereon raises a federal question, notwithstanding that the ordinance is also violative of a similar provision of the state constitution. *San Francisco Gas Co. v. San Francisco*, 189 Fed. 943.

In *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, where the question of "equal protection" and "due process" were specifically dealt with in state court and ruled against plaintiff in error, the supreme court held it had jurisdiction.

That the question of the sufficiency of an indictment in a state court is not a federal question, see *In re Robertson, Petitioner*, 156 U. S. 183.

A good example of a "federal question" and the procedure to reach the supreme court of the United States therewith is seen in *Moore-Mansfield Co. v. Electrical Co.*, 234 U. S. 619, the question being whether a change of decision by a state court works an impairment of the obligation of contracts, the holding being against the proposition.

Note that many of the cases enumerated in Judicial Code, 1911, Section 24, following Paragraph 1, involve a federal question also; although of them there is jurisdiction in the federal courts regardless of amount of money involved.

e. Jurisdiction because of parties—Diversity of citizenship.

(a) Natural persons.

See definition of "citizen" in fourteenth amendment

In *Robertson v. Cease*, 97 U. S. 646, is a discussion of citizenship and residence under the fourteenth amendment, to the effect that the requirements for jurisdictional purposes are not thereby changed.

MINOR v. HAPPERSETT.

Reported in 21 Wallace, 162.

(1874.)

THE chief justice delivered the opinion of the court: The question is represented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the state of Missouri, is a voter in that state, notwithstanding the provision of the constitution and laws of the state, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the state of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state can not by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the state wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There can not be a nation with-

out a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizens" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the articles of confederation and in the constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the constitution itself we find that it was ordained and established by "the people of the United States," and then going further back, we find that these were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth, and that had by articles of confederation and perpetual union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or

any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Whoever, then, was one of the people of either of these states when the constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the constitution itself, for it provides that “no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president,” and that congress shall have power “to establish a uniform rule of naturalization.” Thus new citizens may be born or they may be created by naturalization.

The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words “all children” are certainly as comprehensive, when used in this connection, as “all persons,” and if females are included in the last they must be in the first. That they are

included in the last is not denied. In fact the whole argument of the plaintiffs proceeds upon that idea.

Under the power to adopt a uniform system of naturalization congress, as early as 1790, provided "that any alien, being a free white person," might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born or thereafter to be born out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also.

As early as 1804 it was enacted by congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath; and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married to a citizen of the United States, should be deemed and taken to be a citizen.

From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the country. Thus, by the constitution, the judicial power of the United States is made to extend to controversies between citizens of

different states. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again, at the time of the adoption of the constitution, in many of the states (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

In the legislative department of the government similar proof will be found. Thus, in the pre-emption laws, a widow, "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified, and women, "being citizens of the United States," are permitted to avail themselves of the benefit of the homestead law.

Other proof of like character might be found, but certainly more can not be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the state, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but

it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters? * * *

In *Stone v. South Carolina*, 117 U. S. 430, it is said that in a suit between a state and one of its own citizens and a citizen of another state there is no diversity, a state not being regarded as a citizen.

A citizen of the District of Columbia is not a citizen of a state within the meaning of the jurisdictional provision of the federal constitution. *Hepburn v. Ellzey*, 2 Cr. 445; nor is a citizen of the territory of Mississippi, and joining with other parties who may sue in the federal courts does not confer jurisdiction, *New Orleans v. Winter*, 1 Wh. 91.

That jurisdiction is not lost by change of citizenship during suit, see *Morgan v. Morgan*, 2 Wh. 290, 297; *Clarke v. Mathewson*, 12 Pet. 164, 171; *Tug River Co. v. Brigel*, 86 Fed. 818.

In *Horn v. Lockhart*, 17 Wall. 570, the court held that citizens of the same state can not sue each other in federal courts of the same or another state. (Here citizen of Texas sued citizen of Texas and a citizen of Alabama in federal court in Alabama, but court may strike out the Texas defendant if not necessary.)

In *Morris v. Gilmer*, 129 U. S. 315, the court concludes: "Upon the evidence in this record, we can not resist the conviction that the plaintiff had no purpose to acquire a domicile or settled home in Tennessee, and that his sole object in removing to that state was to place himself in a situation to invoke the jurisdiction of the circuit court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the federal court to determine his new suit. He was, therefore, a mere sojourner in the former state when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler v. Farmsworth*, 4 Wash. C. C., 101, 103, where Mr. Justice Washington said: 'If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicile, however frequent and public his declarations to the contrary may have been.'"

For waiver of jurisdiction as to person, see notes to *Memphis Bank v. Houchens*, 52 C. C. A. 176, and *McPhee & McGinnity Co. v. Union Pacific R. Co.*, 87 C. C. A. 619.

For diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 247, and *Mason v. Dullagham*, 27 C. C. A. 296.

(aa) Domicile.

GILBERT v. DAVID.

Reported in 235 U. S. 561.

(1915.)

MR. JUSTICE DAY delivered the opinion of the court: This case is here upon writ of error and certificate presenting the question of jurisdiction of the district court. It comes under Section 238 of the Judicial Code, and presents to this court the question of jurisdiction only. The suit was begun on November 5, 1904, in the United States circuit court for the district of Connecticut. On May 24, 1905, a substituted complaint was filed. The object of the suit was to recover for alleged breaches of a certain indemnity contract set forth in the complaint. In this substituted complaint, as well as in the original complaint, the allegation as to diverse citizenship is that plaintiff is a citizen of the state of Michigan, and defendants are citizens of the state of Connecticut. On August 3, 1907, an answer was filed, in which it was admitted that the defendants were citizens of the state of Connecticut, and it was averred that the defendants had no knowledge or information as to the citizenship of the plaintiff, and would "leave him to proof thereof." On April 27, 1911, the defendants filed a motion to dismiss the suit for want of jurisdiction. On October 5, 1911, defendants filed another motion to dismiss for want of jurisdiction. On October 6, 1911, the plaintiff filed a motion to strike the last mentioned motion from the files. Both of the motions to dismiss were upon the ground that the plaintiff was not a citizen of the state of Michigan but was a citizen of the state of Connecticut. The motion of the plaintiff to strike the last mentioned motion from the files was upon the ground, among others, that the motion was an improper and irregular method of raising the question of

jurisdiction and because that matter was already in issue under the allegations of complaint and answer.

After the taking effect of the Judicial Code on January 1, 1912, the case was transferred to the district court of the United States for the district of Connecticut. On August 26, 1912, a jury was impanelled, and the case came on for trial. The court directed that the trial should proceed upon the question of jurisdiction. Thereupon the parties proceeded to offer testimony upon the question of plaintiff's residence. At the conclusion of this testimony, the court found that the plaintiff and defendants were citizens of the state of Connecticut at the time the action was begun, and accordingly dismissed the suit upon the sole ground of want of jurisdiction, and ordered the jury discharged from further consideration of the case.

The Act of March 3, 1875, c. 137, 18 Stat. 470, 472--5, now 37 of the Judicial Code, provides:

"If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This section defines the duty of the district court of the United States when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within the court's jurisdiction. While this section gives the court the right to dismiss a suit when that situation appears, whether the parties raise the question or not, it is the duty of the defendant to bring the matter to the attention of the court, in some proper way, where the facts are known upon which a want of jurisdiction appears. *Deputron v. Young*, 134 U. S. 241, 251. Under the former practice, before the

passage of the Act of 1875, above quoted, it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. *Farmingington v. Pillsbury*, 114 U. S. 138, 143; *Little v. Giles*, 118 U. S. 596, 604. The objection may be made now by answer before answering to the merits, or it may be made by motion. *Steigleder v. McQuestion*, 198 U. S. 141. The statute does not prescribe any particular mode by which the question of jurisdiction is to be brought to the attention of the court, and the method of raising the question may be left to the sound discretion of the trial judge. *Wetmore v. Rymer*, 169 U. S. 115, 121. It may be raised by a general denial in the answer, where the state practice permits of that course. *Roberts v. Lewis*, 144 U. S. 653. In the state of Connecticut, under the form of denial contained in this answer, the answer raised the issue. *Sayles v. FitzGerald*, 72 Connecticut, 391, 396. Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. The motion of the plaintiff to strike off the motion to dismiss for want of jurisdiction was based upon the ground that that issue was already made in the pleadings. The question was properly before the court.

It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. *Wetmore v. Rymer*, 169 U. S. 115, *supra*.

It is urged that the delay in making the issue and bringing it to a hearing was such laches upon the part of the defendants as to preclude the consideration of the question. The issue was made when the answer was filed, but for some reason neither party forced the case to trial. Apart from the imperative duty of the court to dismiss the action under the statute, when it appears that the case is not within the jurisdiction of the court, we find nothing in the conduct of the parties to support the suggestion of laches. If it be true that the statute of limitations

would prevent the beginning of a new action in the state court, that fact can not confer jurisdiction upon a court of the United States in the absence of a showing of diverse citizenship.

As the record brings up the testimony upon which the court below decided the question, it becomes the duty of this court to consider it and determine whether the court rightly found that the plaintiff at the beginning of the suit was not a citizen of the state of Michigan. *Wetmore v. Rymer*, 169 U. S. 115, *supra*. If the plaintiff was domiciled in the state of Michigan when this suit was begun, he was a citizen of that state within the meaning of the Judicial Code. *Morris v. Gilmer*, 129 U. S. 315. *Williamson v. Osenton*, 232 U. S. 619, 624. In this case it clearly appears that for some years prior to 1890 the plaintiff lived in Menominee, in the state of Michigan. He had there a home, and exercised the ordinary duties and privileges of citizenship. In February, 1890, his uncle died in Connecticut, and the plaintiff immediately went to Danbury, in that state, where he remained practically all the time until his death in 1911.

The question is, had he lost his domicile in Michigan and acquired one in Connecticut, so that he was at the beginning of the suit in 1904 in reality a citizen of the last mentioned state?

This matter of domicile has been often before this court, and was last under consideration in the case of *Williamson v. Osenton*, 232 U. S. 619, *supra*. In that case the definition of domicile, as defined by Mr. Dicey, in his book on "Conflict of Laws," 2d ed. 111, is cited with approval. There change of domicile is said to arise where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." Or, as Judge Story puts it in his work on "Conflict of Laws," 7th ed. 46, p. 41. "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." "The requisite *animus* is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." *Price v. Price*, 156 Pa. St. 617, 626.

Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicile in the state of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle. He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a temporary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of "holding his residence there." To some witnesses he declared his intention to live in Michigan and expressed his preference for that state as a dwelling place. He continued to pay membership dues to orders to which he belonged in Michigan.

It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile.

We find no error in the conclusion of the district court upon the question of jurisdiction, and its judgment is therefore *affirmed*.

Where a citizen of Pennsylvania, declaring his intention to move to New Orleans, broke up his family establishment, but instead moved into New Jersey, while there brought suit in the United States court in Pennsylvania claiming jurisdiction on the ground of diversity of citizenship, then pending the suit moved back to Pennsylvania, jurisdiction will

depend upon his intention as to domicile and his good faith. *Cooper v. Galbraith*, Fed. Cas. 3193.

In *Marks v. Marks*, 75 Fed. 321, is an extended discussion by District Judge Clark of "residence" and "domicile," of an adult and of an infant, and of the need for domicile in a particular federal judicial district as distinguished from domicile in the state generally, holding the latter sufficient.

(bb) The alien.

MONTALET v. MURRAY.

Reported in 4 Cranch, 46.

(1807.)

ERROR to the circuit court for the district of Georgia. The action was brought in the court below by Murray, a citizen of the state of New York, against Montalet, an alien, and citizen of the French republic, upon sundry promissory notes, made by the defendant, at St. Domingo, payable to the order of Monsieur Caradeaux de la Caye, whose residence, or citizenship, or national character, did not appear in the declaration.

It was suggested, that it did not appear by the record, that a suit could have been prosecuted in that court, to recover the contents of those notes, if no assignment had been made, and therefore, the court could not take cognizance of the present case, being prohibited by the act of congress (1 U. S. Stat. 78, Par. 11). * * *

The court was unanimously of opinion, that the courts of the United States have no jurisdiction of cases between aliens.

BROWNE v. STRODE.

Reported in 5 Cranch, 303.

(1809.)

THIS was a case certified from the circuit court for the district of Virginia, the judges of that court being divided in opinion upon the question whether they had jurisdiction of the case.

It was an action on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia. The object of the suit was to recover a debt due from the testator, in his lifetime, to a British subject. The

defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the peace for the county of Stafford, and were all citizens of Virginia.

The question being submitted without argument.

The court ordered it to be certified, as their opinion, that the court below has jurisdiction in the case.

(Note that the suit is for the benefit of an alien, who is regarded as the real plaintiff.—EDITOR.)

JACKSON v. TWENTYMAN.

Reported in 2 Peters, 136.

(1829.)

THIS cause was brought before the court by a writ of error to the circuit court of the southern circuit of New York.

The description of the parties on the record was "*John Twentyman, a subject of the king of Great Britain v. Daniel and Joseph Jackson;*" no citizenship of the defendants being averred.

The question was, whether the circuit court, under the eleventh section of the Judiciary Act of 1789, ch. 20, which gives jurisdiction, among other cases, "where an alien is a party," had jurisdiction of the cause, without an averment in the record of the citizenship of the defendants.

The court were of opinion, that the eleventh section of the act must be construed in connection with, and in conformity to, the constitution of the United States. That, by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party. It was indispensable, therefore, to aver the citizenship of the defendants, in order to show, on the record, the jurisdiction of the court. The omission so to do was fatal, and according to the known course of the decisions of the court, the judgment of the circuit court must be reversed, for want of jurisdiction. *Judgment reversed.*

IN RE HOHORST.

Reported in 150 U. S. 653.

(1893.)

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court. * * * (After citing some provisions of the

constitution and of the Acts of 1887 and 1888 relating to the jurisdiction of the courts, he proceeds:)

The question then arises how far the jurisdiction thus conferred over this last class of controversies, and especially over a suit by a citizen of a state against a foreign citizen or subject, is affected by the subsequent provisions of the same section, by which, after other regulations of the jurisdiction of the circuit courts and district courts of the United States, it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Of these two provisions, the latter relates only to suits between citizens of different states of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these states against an alien. And the former of the two provisions can not reasonably be construed to apply to such a suit.

The words of that provision, as it now stands upon the statute books, are that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole.

This view is confirmed by a consideration of the earlier statutes upon this subject, which, although repealed, may properly be referred to in aid of the construction of existing laws.

Ex parte Crow Dog, 109 U. S. 556, 561; *Viterbo v. Friedlander*, 120 U. S. 707, 725, 726. The corresponding provision, as originally enacted in the Judiciary Act of September 24, 1789, c. 20, Par. 11, continued in force for the greater part of a century, and retained in the Revised Statutes, applied only to inhabitants of the United States; for its words were that no civil suit should be brought "against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79; Rev. Stat., Par. 739. The substitution, in the Act of March 3, 1875, c. 137, Par. 1, of the words "against any person" for the words "against an inhabitant of the United States," has been assumed to be an immaterial change. 18 Stat. 470; *In re Louisville Underwriters*, 134 U. S. 488, 492; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 448. But if the Act of 1875 could have been treated as extending the provision to suits against aliens, it could only be by virtue of the clause permitting defendants to be sued in the district in which they were found. That clause having been stricken out in the Acts of 1887 and 1888, the provision, as it stands in these acts, must be limited by implication, as the provision in its original form was by express words, to inhabitants of the United States; and it is therefore inapplicable to an alien or to a foreign corporation.

Upon deliberate advisement, and for the reasons above stated, we are of opinion that the provision of the existing statute, which prohibits suit to be brought against any persons "in any other district than that whereof he is an inhabitant," is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. *In re Louisville Underwriters*, 134 U. S. 488.

The question, then, whether the Hamburg-American Packet Company was bound to answer to the suit brought by this petitioner against it, depended upon the question whether Henry R. Kunhardt, Sr., upon whom the subpoena was served, was such an agent of the company that service upon him as its agent was sufficient service upon the company.

The marshal's return upon the subpoena states that the service thereof upon the company was made by serving it upon said Kunhardt, "general agent for said company." This return, of course, is not conclusive of that fact. But upon the affidavits filed by the company, giving them the utmost effect in its favor, the real state of facts was as follows: There is no room for suggesting that there was within the district any director or other officer of the company, or any agent expressly authorized to accept service upon it. The company's docks where its steamships land and take and discharge cargo, and its office for the transaction of matters immediately connected with its actual industrial operations in this country, were in the state of New Jersey, and under the charge of a superintendent employed and paid by the corporation for the purpose, and not a member of the firm of Kunhardt & Co. But the usual monetary and financial transactions of the corporation were transacted by that firm, as agents of the corporation, at the office of the firm in the city of New York, which had been advertised by the corporation as its own office.

The firm of Kunhardt & Co. being the financial agents of the corporation, the office of the firm being in the city of New York, and being the office of the corporation for the transaction of its monetary and financial business in this country, the service of the subpoena in New York upon the head of the firm as general agent of the corporation was a sufficient service upon the corporation. *St. Clair v. Cox*, 106 U. S. 350, 359; *Societe Fonciere v. Milliken*, 135 U. S. 304; *Mexican Central Railway v. Pinkney*, 149 U. S. 194; New York Code of Civil Procedure, Par. 432; *Tuchband v. Chicago & Alton Railroad*, 115 N. Y. 437.

In *Barrow Steamship Co. v. Kane*, 170 U. S. 100, jurisdiction was asserted where a citizen of one state brings suit in the United States circuit court of another state against an alien corporation doing business in the latter state, to recover for a tort committed in a foreign country.

See *The Sapphire*, 11 Wall. 164, for a suit in the United States circuit court of California by the Emperor of the French against a vessel, for a collision.

In *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 496, where an alien sues the railway company, the court reviews the earlier cases and concludes that the suit must be brought in the district where the corporation had its chief office and place of business, and a suit could not be entertained in some other district of the same state.

Notice the elaborate dissent of Justices Jackson and Harlan in this case, and the comment thereon by Cochran, D. J., in *Kentucky Coal Lands Co. v. Mineral Development Co.*, 191 Fed. R. 899, at p. 909.

And *Republic of Columbia v. Cauca Co.*, 190 U. S. 524, the defendant being a corporation of West Virginia, the suit being to set aside an award, and cross-bill having been filed to establish the award as valid, the judgment confirming the award.

(cc) Plurality of plaintiffs or defendants.

STRAWBRIDGE v. CURTISS.

Reported in 3 Cranch, 267.

(1806.)

THIS was an appeal from a decree of the circuit court for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction. Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont, and upon whom the subpoena was served in that state.

The question of jurisdiction was submitted to the court, without argument, by P. B. Key, for the appellants, and Harper, for the appellees. On a subsequent day—

MARSHALL, Chief Justice, delivered the opinion of the court: The court has considered this case, and is of opinion, that the jurisdiction can not be supported.

The words of the act of congress are, "where an alien is a party, or the suit is between a citizen of a state where the suit is brought, and a citizen of another state." The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and other are not, competent to sue, or liable to be sued, in the courts of the United States. *Decree affirmed.*

Coal Company v. Blatchford, reported in 11 Wall. 172. (1870.) See below p. 288.)

SWEENEY v. CARTER OIL COMPANY.

Reported in 199 U. S. 252.
(1905.)

THIS was an action of *assumpsit* brought in the circuit court of the United States for the northern district of West Virginia by, as described in the summons, "Francis B. Sweeney, a resident in and citizen of the state of New York, and Halbert J. Porterfield, a resident in and citizen of the state of Pennsylvania, partners doing business under the firm name and style of Sweeney & Porterfield," against "Carter Oil Company, a corporation created, organized and existing under and by virtue of the laws of West Virginia, and as such a citizen thereof," to recover damages in the sum of \$20,000.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement delivered the opinion of the court: The circuit court dismissed the case for want of jurisdiction in that the controversy was not between citizens of different states, within the meaning of the statute, because plaintiffs were citizens of different states as between themselves, and could not be joined in an action against a citizen of West Virginia. That was the sole point determined below, and the correctness of the conclusion is the sole question for determination here.

Defendant does indeed argue that the judgment should be affirmed because the declaration, though stating a sum of money to be due plaintiffs in excess of two thousand dollars, did not aver that this was "exclusive of interest and costs;" and did not aver that defendant was "a resident or inhabitant of the northern district of West Virginia," nor was that fact "apparent from the record;" and because the citizenship of plaintiffs and defendant was not averred with sufficient directness. None of these points was raised below, and, as the record stands, they call for no consideration.

The judicial power under the constitution extends to "controversies between citizens of different states."

The first section of the Act of March 3, 1887, as corrected by that of August 13, 1888, 25 Stat. 433, c. 866, provides

“that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, * * * and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * *”

The controversy here was “between citizens of different states;” the jurisdiction of the circuit court was founded on diversity of citizenship; and the suit was brought in the district of the residence of the defendant.

We do not feel warranted in construing the words “controversy between citizens of different states” to mean “controversy between citizens of the same state and citizens of another state,” and unless that is done this judgment must be reversed.

In our opinion defendant, being a citizen of West Virginia, and a resident of the district in which it was sued, and plaintiffs being citizens of other states than West Virginia, the circuit court had jurisdiction.

The general subject was considered in *Smith v. Lyon*, 133 U. S. 315, the opinion of the court being delivered by Mr. Justice Miller. In that opinion it is pointed out that the first clause of the Act of 1887 describes the jurisdiction common to all the circuit courts of the United States as regards the subject-matter of the suit, and as regards the character of the parties, who by reason of such character may, either as plaintiffs or defendants, sustain suits in circuit courts; while the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits: and after quoting the latter clause in full Mr. Justice Miller said:

“In the case before us, one of the plaintiffs is a citizen of the state where the suit is brought, namely, the state of Missouri, and the defendant is a citizen of the state of Texas. But one of the plaintiffs is a citizen of the state of Arkansas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a state of which either of them is a citizen.”

Referring to the language of Section 11 of the Judiciary Act of 1789, giving jurisdiction to the circuit courts, “where the suit is between a citizen of the state where the suit is brought and a citizen of another state,” the following from the opinion of Chief Justice Marshall, in *Strawbridge v. Curtiss*, 3 Cranch, 267, was quoted: “The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts,” which construction it was said has been adhered to from that day to this, notwithstanding the statute has been re-enacted and recast several times since that decision. *New Orleans v. Winter*, 1 Wheat. 91; *Coal Company v. Blatchford*, 11 Wall. 172; *The Sewing Machine Companies*, 18 Wall. 553, and *Peninsular Iron Company v. Stone*, 121 U. S. 631, were cited in reiteration of the rule that “if there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction can not be entertained.” And the rule was held applicable under the Act of 1887, especially in view of the fact that that

act was mainly designed to restrict the jurisdiction of the circuit courts.

But if these citizens of Missouri and Arkansas had sued the defendant, a citizen of Texas, in the circuit court of the United States for the district of his residence in Texas, we perceive no reason why that court would not have had jurisdiction.

And this would be so if that defendant had sued those plaintiffs in his district in Texas if he there obtained service of process upon them.

In *McCormick Harvesting Machine Company v. Walthers*, 134 U. S. 41, 44, we said: "The Judiciary Act of 1789 provided that no civil suit should be brought before the circuit or district courts against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he should be found at the time of serving the writ, 1 Stat. 79, c. 20, Par. 12, and the Act of 1875, 18 Stat. 470, c. 137, Par. 1, contained a similar provision. This liability of the defendant to be sued in a district where he might be found at the time of serving process was omitted in the Act of 1887, but he still remained liable as well as in his own district; and as he could not be sued anywhere else, we held in *Smith v. Lyon*, 133 U. S. 315, that where there were two plaintiffs, citizens of different states, the defendant, being a citizen of another state, could not be sued in the state of either of the plaintiffs. Mr. Justice Miller points out, in delivering the opinion of the court, that the evident purpose of congress in the Act of 1887 was to restrict rather than enlarge the jurisdiction of the circuit court, 'while,' he says, 'at the same time a suit is permitted to be brought in any district where either plaintiff or defendant resides.' " In that case plaintiff was a citizen of Nebraska and brought suit in the circuit court of the district of Nebraska against an Illinois corporation, service being made on defendant's managing agent in Nebraska, as provided by the state statute. Defendant answered and then on leave withdrew the answer and filed a plea to the jurisdiction. The plea was overruled, and thereupon defendant went to trial on the merits upon issue joined on that answer. It was held that the objection to the jurisdiction, if it could be urged at all, must be confined to

want of power to entertain the suit outside of defendant's own district, and that it was without merit.

Many decisions in respect of removal of cases of diverse citizenship are to the same effect. Thus in *The Removal Cases*, 100 U. S. 457, the provision of the Act of 1875 that as to suits "in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district," was construed to mean "that when the controversy about which a suit in the state court is brought is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed." *Young v. Parker*, 132 U. S. 267; *Ballin v. Lehr*, 24 Fed. Rep. 193; *Pitkin County Mining Company v. Markell*, 33 Fed. Rep. 386; *Roberts v. Pacific & A. Railway & Nav. Co.*, 104 Fed. Rep. 377.

The contention in the present case seems to be that because defendant could not sue plaintiffs in the circuit court of New York, or that of Pennsylvania, therefore plaintiffs could not sue defendant in the circuit court for the northern district of West Virginia. But this does not follow from the terms of the statute by which jurisdiction is conferred generally where plaintiffs are residents and citizens of states different from that of the residence and citizenship of defendant; and, moreover, defendant could, if it had a cause of action, have sued plaintiffs in the circuit court for the northern district of West Virginia and proceeded with the action if they were served with process in such district. The clause vesting jurisdiction should not be confounded with the clause determining the particular courts in which the jurisdiction must be exercised.

Judgment reversed and cause remanded to be proceeded in according to law.

"Each of the members of a partnership must have the requisite citizenship to give the court jurisdiction, and it is neither conferred or withheld by reason of the state of the partnership's organization, or in which it conducts business. Nor does any presumption arise therefrom that the members of the partnership are citizens of said state." *Columbia Digger Co. v. Rector*, 215 Fed. 618, 622.

(aaa) Legal representative.

COAL COMPANY v. BLATCHFORD.

Reported in 11 Wallace, 172.

(1870.)

MR. JUSTICE FIELD delivered the opinion of the court: The eleventh section of the Judiciary Act of 1789 vests in the circuit courts original jurisdiction of suits of a civil nature, at law and in equity, when the matter involved exceeds, exclusive of costs, the sum or value of five hundred dollars, in three classes of cases: 1st, when the United States are plaintiffs or petitioners; 2d, when an alien is a party; and, 3d, when the suit is between a citizen of the state where the suit is brought and a citizen of another state.

In the last two classes the designation of the party, plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numerous, so that each district interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued, in the federal courts. In other words, if there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction can not be entertained. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. This has been repeatedly adjudged. It was so adjudged as early as 1808, in *Chappedelaine v. Dechenaux*, where the complainants, though citizens of France, brought suit, one as residuary legatee and the other as *administrator de bonis non* of a testator, who had been a citizen of Georgia, against the defendant, who was a citizen of that

state. Counsel, on opening the question of jurisdiction, was stopped by the court, Mr. Chief Justice Marshall observing that the impression of the court was that the case was clearly within the jurisdiction of the courts of the United States; that the plaintiffs were aliens; and, although they sued as trustees, they were entitled to sue in the circuit court. This ruling was followed in *Childress v. Emory*; and in *Osborn v. The Bank of the United States*, the Chief Justice laid it down as a universal rule that, in controversies between citizens of different states, the jurisdiction of the federal courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record.

These authorities are conclusive of the present case. The defendant is a corporation created under the laws of Pennsylvania. One of the plaintiffs, Blatchford, describes himself in the bill as a citizen of the state of New York, and the plaintiff Newman describes himself as a citizen of Pennsylvania, and they both describe themselves as trustees, who sue solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and of Joseph Loyd, a citizen of New Jersey. The demurrer of the defendant raises the objection that the plaintiff, Newman, is a citizen of the same state with the defendant, and that the court has in consequence no jurisdiction of the case. If there were no other parties, the suit clearly would not lie, for the eleventh section of the Judiciary Act only authorizes a suit between citizens of different states, not between citizens of the same state. And the objection, according to the construction we give to that section and to the authorities cited, is equally available when a disqualified party is joined with others who are qualified. * * *

The case is not one where a plea in abatement was required to raise the question of citizenship. Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the

jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits.

RICE v. HOUSTON, ADMINISTRATOR.

Reported in 13 Wallace, 66.

(1871.)

ERROR to the circuit court for the middle district of Tennessee; the case being thus:

A. W. Vanleer, a citizen of Tennessee, having died at Nashville, letters of administration were granted by the proper authority there to one Houston, on his estate. It seemed to be admitted by counsel that, at this time, Houston was a citizen of Tennessee. But he afterwards, it was equally admitted, was in Kentucky and domiciled there. Thus domiciled he brought two suits in the court below, the circuit court for the middle district of Tennessee, to recover from Rice on certain notes given to his decedent, Vanleer. In these suits he described himself in his *narr.* as “a citizen of the state of Kentucky and administrator of the estate of A. W. Vanleer, deceased.” The defendant craved oyer of the letters. This disclosing that the letters were granted in Tennessee, the defendant pleaded that “by the said letters of administration it appears that the administrator of the estate of the said A. W. Vanleer is the creature of the law of Tennessee, and has no existence as such outside of the state of Tennessee.” To this plea the plaintiff demurred, and the demurrer being held good and judgment given for the plaintiff, the defendant brought the case here. The point involved was of course the jurisdiction of the circuit court.

MR. JUSTICE DAVIS delivered the opinion of the court: The question of jurisdiction is the only point in the case.

Although in controversies between citizens of different states, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court that suits can be maintained in the circuit court by executors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of

law. And it makes no difference that the testator or intestate was a citizen of the same state with the defendants, and could not, if alive, have sued in the federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same state with the defendants.

In this state of the law on this subject, it is not perceived on what ground the right of Houston to maintain these suits can be questioned. He was a citizen of Kentucky, had the legal interest in the notes sued on, by virtue of the authority conferred on him by the court in Tennessee, and, therefore, had a right to bring his action in the federal or state courts at his option.

It is to be presumed, in the absence of an averment in the pleadings to the contrary, that Houston, when appointed administrator, was a citizen of Kentucky, and if so the appointment was legal, for the laws of Tennessee do not forbid the probate courts of that state to intrust a citizen of another state with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee.

But if the fact be otherwise, as seems to be admitted in argument, and Houston were a citizen of Tennessee at the time he got his letters of administration, the liability of the defendants to be sued in the federal courts remains the same, because there is no statute of Tennessee requiring an administrator not to remove from the state, and the general law of the land allows any one to change his citizenship at his pleasure. After he has in good faith changed it, he has the privilege of going into the United States courts for the collection of debts due him by citizens of other states, whether he holds the debts in his own right or as administrator. *Judgment affirmed.*

(bbb) Rearrangement and dismissal of parties.

VENNER v. GREAT NORTHERN RAILWAY COMPANY.

Reported in 209 U. S. 24.

(1908.)

MR. JUSTICE MOODY delivered the opinion of the court: The plaintiff in error, a citizen of New York, brought this suit in equity in the supreme court of New York against the defendant railroad, a citizen of Minnesota, and the other defendant, its

president, also a citizen of Minnesota. The complaint set forth in substance the following facts upon which the right to relief was claimed: The plaintiff was a stockholder in the defendant railroad at the time of the beginning of the suit in 1906. Whether or not he was a stockholder at the time when the alleged wrongful acts were committed by the defendants does not appear by any allegation in the complaint. The defendant, James J. Hill, was a director and the president of the other defendant, the Great Northern Railway Company, and that railroad and its board of directors were under his absolute control. While holding these offices and exercising this control, in 1900 and 1901, Hill purchased, or caused to be purchased for his use, stock of the Chicago, Burlington and Quincy Railroad Company of the par value of \$25,000,000, at an average price of one hundred and fifty dollars a share. This purchase was made with the design of selling the stock at a higher price to the company of which he was a director and president. Subsequently, in 1901, while still holding his offices in the Great Northern Railway and exercising the same control over that corporation, he sold to it a large amount of the stock of the Chicago, Burlington and Quincy Railroad Company owned by him, and made an unlawful profit of \$10,000,000 on the transaction. Before bringing this suit the plaintiff demanded of the Great Northern Railway Company that it bring suit against Hill to compel him to account for and pay over to it the wrongful profit which he had obtained. The railroad refused to comply with this demand, and thereupon the plaintiff brought this suit as a stockholder in his own behalf, and in the behalf and for the benefit of other stockholders similarly situated. The prayer was that Hill should account for his profit and pay it to the Great Northern Railway Company with interest, and for general relief. On the defendants' petition the case was removed to the United States circuit court for the southern district of New York, on the ground of diversity of citizenship of the plaintiff and the defendants. In that court the plaintiff was ordered to "replead the complaint herein according to the forms and practice prevailing in equity." This was done on November 9, 1906. The new complaint set forth the facts in greater detail and with some varia-

tions, but its substance and effect was similar to that of the first complaint. The complaint did not conform to the requirements of Equity Rule 94, relating to suits of this nature, in that it failed to allege that the plaintiff was a shareholder at the time of the transactions of which he complains, or that his shares had devolved on him since by operation of law, or that the suit was not collusive, or the particulars of his efforts to procure action by the corporation defendant. The defendants then demurred separately to the bill and the defendant Hill subjoined to his demurrer an affidavit denying every allegation in it tending to show wrongful conduct on his part. Thereafter the plaintiff moved to remand the cause to the state court on the ground that the circuit court was without jurisdiction over it. This motion was denied. The demurrer was sustained and the bill dismissed. The correctness of the ruling on the demurrer and the dismissal is not before us. The case comes here on direct appeal from the circuit court on the question of jurisdiction alone, certified in the following terms: "Now, therefore, the court certifies to the supreme court of the United States the question of jurisdiction which has arisen upon the aforesaid motion to remand and the demurrers to the complaint, to wit: Whether or not the complainant's amended bill of complaint showed that there was such diversity of citizenship between the party complainant and the parties defendant in this cause as would be sufficient, under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States circuit court for the southern district of New York of this cause, and whether this cause, as brought in the supreme court of the state of New York, was one over which this court would have had original jurisdiction, and was therefore removable into this court."

We consider nothing but the question of jurisdiction, and express no opinion upon the decision upon the demurrer which is not properly here. *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500; *Smith v. McKay*, 161 U. S. 355; *Mexican Central Railway Co. v. Eckman*, 187 U. S. 429; *Hennessy v. Richardson Drug Co.*, 189 U. S. 25; *Chicago v. Mills*, 204 U. S. 321.

The cause was removable to the circuit court by the defendants if it was one of which that court was given jurisdiction. 25 Stat. 434; *Mexican National Railroad Company v. Davidson*, 157 U. S. 201; *Traction Company v. Mining Company*, 196 U. S. 239. The only ground of original jurisdiction or of removal was that the suit was a controversy between citizens of different states. In that case congress has given the circuit court jurisdiction over it, with certain limitations not material here. 25 Stat. 434. The plaintiff contends that the circuit court was without jurisdiction of the cause, and should therefore have remanded it to the state court, for two reasons. First, because upon a proper alignment of the parties there was not a controversy between citizens of different states. Second, because the cause of action as disclosed by the pleadings showed that the circuit court had no jurisdiction over the subject-matter. These reasons are entirely independent of each other and require separate consideration. First, was there a controversy between citizens of different states? As the parties were arranged by the plaintiff himself on the face of the record, there was a diversity of citizenship. The plaintiff was a citizen of New York and the two defendants were citizens of Minnesota. But the plaintiff insists that by looking through the superficial aspects of the controversy to its real substance it is seen that the railway company's interest is adverse to that of the other defendant, and the same as that of the plaintiff, and that, therefore, for the purpose of determining the jurisdiction, the defendant railroad should be regarded as a plaintiff. If this should be done there would be a citizen of Minnesota a plaintiff and another citizen of Minnesota a defendant, and the diversity of citizenship which is indispensable to the jurisdiction of the circuit court would no longer exist. Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really places them, and then may determine the jurisdictional question in view of this alignment. *Removal Cases*, 100 U. S. 457; *Pacific Railroad v. Ketchum*, 101 U. S. 289; *Harter v. Kernochan*, 103 U. S. 562; *Wilson v. Oswego Township*, 151 U. S. 56, 63; *Merchants' Cotton Press*

Co. v. Insurance Company of North America, 151 U. S. 368, 385; *Evers v. Watson*, 156 U. S. 527, 532. If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. *Davenport v. Dows*, 18 Wall. 626; *The Central Railroad Company v. Mills*, 113 U. S. 249; *Railroad v. Grayson*, 119 U. S. 240; *Doctor v. Harrington*, 196 U. S. 579; *Groel v. United Electric Co.*, 132 Fed. Rep. 252, and see *Chicago v. Mills*, 204 U. S. 321. The case of *Doctor v. Harrington* is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the circuit court against the corporation and Harrington, another stockholder, "who directed the management of the affairs of the corporation, dictated its policy, and selected its directors." It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interest was the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic, and made to act in a way detrimental to his rights. In other words, his interests, and

the interests of the corporation, may be made subservient to some illegal purpose. If the controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a federal court." There was therefore in the case at bar the diversity of citizenship which confers jurisdiction.

(dd) Sufficient allegation.

CAPRON v. VAN NOORDEN.

Reported in 2 Cranch, 126.

(1804.)

ERROR to the circuit court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, Van Noorden, upon which judgment was rendered.

The writ of error was sued out by Capron, the plaintiff below, who assigned for error, among other things, first, "that the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said George Capron, or the said Hadrianus Van Noorden, was an alien, at the time of the commencement of said suit, or at any other time, or that one of the said parties was, at that. or any other time, a citizen of the state of North Carolina where the suit was brought, and the other a citizen of another state; or that they, the said George and Hadrianus were, for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being sued there." And secondly, "that by the record aforesaid, it manifestly appeareth, that the said circuit court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof, or given judgment therein, but ought to have dismissed the same, whereas, the said court hath proceeded to final judgment therein." * * *

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed.

BROWN v. KEENE.

Reported in 8 Peters, 112.

(1834.)

MARSHALL, Chief Justice, delivered the opinion of the court: This appeal is from a decree of the court of the United States for the district of Louisiana. The first error assigned in the proceedings is, that the petition, which, in the practice of Louisiana, is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded, it is undoubtedly fatal.

The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either. The additional words of description, "holding his fixed and permanent domicile in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicile; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments.

The constitution extends the judicial power to "controversies between citizens of different states." and the Judiciary Act gives jurisdiction "in suits between a citizen of the state where the suit is brought, and a citizen of another state." The decisions of this court require, that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

In *Bingham v. Cabot*, 3 Dall. 382, the court held clearly, that it was necessary to set forth the citizenship (or alienage, when a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the court, and

that the record was, in that respect, defective. In *Abercrombie v. Dupuis*, 1 Cranch, 343, the plaintiffs below averred, "that they do severally reside without the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant was called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favor of the plaintiff below was reversed, on the authority of the case of *Bingham v. Cabot*. In *Wood v. Wagon*, 2 Cranch, 9, the judgment in favor of the plaintiff below was reversed, because his petition did not show the jurisdiction of the court. It stated the plaintiff to be a citizen of the state of Pennsylvania, and James Wood, the defendant, to be "of Georgia, aforesaid." *Capron v. Van Noorden*, 2 Cranch, 126, was reversed, because the declaration did not state the citizenship or alienage of the plaintiff in the circuit court. The same principle has been constantly recognized in this court.

The answer of James Brown asserts, that both plaintiff and defendant are citizens of the state of Louisiana. Without indicating any opinion on the question, whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion, that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is, that both plaintiff and defendant are citizens of Louisiana.

The decree of the court for the district of Louisiana is to be reversed, that court not having jurisdiction, and the appeal to be dismissed. The cross-appeal, *Keene v. Brown*, is to be dismissed, the court having no jurisdiction.

In *Bingham v. Cabot*, 3 Dall. 382, where there was no express designation of any of the parties, plaintiff or defendant, as citizens, the court struck the case from the docket.

ROBERTSON v. CEASE.

Reported in 97 U. S. 646.

(1878.)

MR. JUSTICE HARLAN delivered the opinion of the court: This action was instituted on the 25th of September, 1873, by Cease, as the assignee of a note for \$4,190, executed in

Texas by Robertson, plaintiff in error, on the 2d of October, 1860, and made payable July 1, 1861, to the order of W. J. Chamblin, with interest at the rate of ten per cent. per annum from date.

Does it sufficiently appear from the record that the case is within the jurisdiction of the circuit court? That is the first question to be considered upon this writ of error.

The payee, Chamblin, a citizen of Illinois, died in that state on the 29th of April, 1871. In September, 1873, the note sued on was assigned by his administrators to Cease. It appears from the pleadings that the heirs and administrators of Chamblin were also citizens of Illinois, both when the note was assigned to Cease and at the commencement of this action. It is also averred that Robertson, when sued, was a citizen of Texas, but there is no allegation as to the citizenship of Cease. The averment as to him is, that he "resides in the county of Mason and state of Illinois." It is, however, claimed by counsel to be apparent, or to be fairly inferred from certain documents or papers copied into the transcript, that Cease was, at the commencement of the action, a citizen of Illinois. One of those documents is a written notice, served by Robertson upon Cease's attorneys, that he would apply for a commission to examine as witnesses, in support of the plea in abatement, "Chamblin, Winn, and Henry Cease, citizens of the county of Mason, state of Illinois." The commission which issued, under that notice, from the clerk's office directed the examination of these witnesses, who are, in that document also, described as citizens of Illinois. The other document referred to is the deposition of Cease, which opens thus: "My name is Henry Cease; residence, Mason county, Illinois; age, 52 years; occupation, grain dealer and farmer."

It is the settled doctrine of this court that, in cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts, essential to support that jurisdiction, must appear somewhere in the record. Said the chief justice, in *Railway Company v. Ramsey*, 22 Wall. 322: "They need not necessarily, however, be averred in the pleadings. It is sufficient if they are, in some form, affirmatively shown by

the record." That view was approved in the subsequent case of *Briges v. Sperry*, 95 U. S. 401. Under the doctrine of these cases, it is contended that the citizenship of Cease in Illinois is satisfactorily shown by the foregoing documents, which, it is insisted, are a part of the record upon this writ of error. But this position can not be maintained. It involves a misapprehension of our former decisions. When we declared that the record, other than the pleadings, may be referred to in this court, to ascertain the citizenship of parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which had been improperly inserted in the transcript. Those relied upon here to supply the absence of distinct averments in the pleadings as to the citizenship of Cease, clearly do not constitute any legitimate part of the record. They are not so made either by a bill of exceptions, or by any order of the court referring to them, or in any other mode recognized by the law. As there is nothing to show that the deposition of Cease, or the commission, or notice under which it was taken, was before the jury or the court for any purpose, during the trial, no fact stated in them can be made the foundation of any decision we might render, either upon the merits or the question of jurisdiction. Looking, then, at the pleadings, and to such portions of the transcript as properly constitute the record, we find nothing beyond the naked averment of Cease's residence in Illinois, which, according to the uniform course of decisions in this court, is insufficient to show his citizenship in that state. Citizenship and residence, as often declared by this court, are not synonymous terms. *Parker, et al., v. Overman*, 18 How. 137.

In the oral argument before this court, the inquiry arose, whether since the adoption of the fourteenth amendment to the federal constitution the mere allegation of residence in Illinois did not make such a *prima facie* case of citizenship in that state as, in the absence of proof, should be deemed sufficient to sustain the jurisdiction of the circuit court. That amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States, and of the state where they reside." It was suggested that a resident of one of the states is *prima facie* either a citizen of the United States or an alien—if a citizen of the United States, and also a resident of one of the states, he is, by the terms of the fourteenth amendment, also a citizen of the state wherein he resides—and if an alien, he was entitled in that capacity to sue in the federal court, without regard to residence in any particular state. It is not to be denied that there is some force in these suggestions, but they do not convince us that it is either necessary or wise to modify the rules heretofore established by a long line of decisions upon the subject of the jurisdiction of the federal courts. Those who think that the fourteenth amendment requires some modification of those rules, claim, not that the plaintiff's residence in a particular state necessarily or conclusively proves him to be a citizen of that state, within the meaning of the constitution, but only that a general allegation of residence, without indicating the character of such residence, whether temporary or permanent, made a *prima facie* case of right to sue in the federal courts. As the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the adoption of the fourteenth amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record. And so where jurisdiction depends upon the alienage of one of the parties. In *Brown v. Keene* (8 Pet. 115), Mr. Chief Justice Marshall said: "The decisions of this court require that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." Here the only fact averred, or appearing from the record, is that Cease was a

resident of Illinois; and we are, in effect, asked, in support of the jurisdiction of the court below, to infer argumentatively, from the mere allegation of "residence," that, if not an alien, he had a fixed permanent domicile in that state, and was a native or naturalized citizen of the United States, and subject to the jurisdiction thereof. By such argumentative inferences, it is contended that we should ascertain the fact, vital to the jurisdiction of the court, of his citizenship in some state other than that in which the suit was brought. We perceive nothing in either the language or policy of the fourteenth amendment which requires or justifies us in holding that the bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction. The judgment must, therefore, be reversed, upon the ground that it does not affirmatively appear from the record that the defendant in error was entitled to sue in the circuit court.

The plaintiff in error insists that the reversal should be with directions to dismiss the petition, since he contends that an amendment of the pleadings, stating the citizenship of Cease, would be, in legal effect, a new suit, asserting a new cause of action, which would be barred by the statute of limitations. But it is clear than an amendment of that nature could not be so regarded, either upon principle or authority. It would introduce no new cause of action. It would only show, if its allegations as to citizenship are true, that the court had jurisdiction, from the commencement of the litigation, of the cause of action set out in the original petition. Whether after such an amendment the action would be barred by limitation would depend upon the time which had elapsed before the filing of the original petition, and not upon the time which had elapsed previous to the amendment. The allowance of such an amendment, under the circumstances of this case, is sustained by the former practice of this court. In *Morgan's Exrs. v. Gay* (19 Wall. 81), the judgment of the court below was reversed, because it did not affirmatively appear that the citizenship of the parties was such as to give it jurisdiction; and the cause was sent back, "that amendment may be made in the pleadings, showing the citizenship of the

indorser of the bills, if it be such as to give the court jurisdiction of the case." Such a course is peculiarly proper in this case, in view of the failure of the plaintiff in error to make, in the court below, the precise question of jurisdiction which he urges upon our consideration. He filed, it is true, a plea to the jurisdiction of the circuit court; but it did not impeach its jurisdiction upon the distinct ground that Cease did not appear to be a citizen of the state in which he resided. His denial of jurisdiction was upon the ground that the assignment to Cease was merely colorable, and for the fraudulent purpose of dispensing with letters of administration upon Chamblin's estate in Texas, thereby enabling a suit to be brought in the court below, in the name of the assignee, but really for the use and benefit of that estate. The parties, as we infer from the record, went to trial before the jury without any real controversy as to the citizenship of Cease being in Illinois. After verdict, Robertson moved in arrest of judgment, upon the general ground that there was "no cause of action stated in plaintiff's petition of which this court can take cognizance, and because it appears from the face of the pleadings that this court has no jurisdiction of the cause." But we can not feel sure, from this general language, or from anything in the record, that attention was called in the court below to the defect in the pleadings to which our attention has been specially directed. For these reasons the defendant in error should be allowed to amend the petition in respect to his citizenship at the commencement of the action, if his citizenship was then such as to authorize the court to proceed with the trial.

The assignment of errors embraces other questions, as to which we withhold any expression of opinion. Since the record shows no case of which the circuit court had jurisdiction, we do not feel at liberty, upon this writ of error, to determine any point affecting the merits of the litigation.

The judgment of the circuit court must, therefore, be reversed, with directions to grant a new trial, and for such further proceedings as may be in conformity to this opinion; and it is *so ordered*.

GRACE v. AMERICAN CENTRAL INSURANCE CO.

Reported in 109 U. S. 278.

(1883.)

MR. JUSTICE HARLAN * * * . The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do not feel at liberty to pass without notice. *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450; *Jackson v. Ashton*, 8 Pet. 148. As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. *Turner v. Bank of North America*, 4 Dall. 8; *Ex parte Smith*, 94 U. S. 455; *Robertson v. Cease*, 97 U. S. 646. In the last case it is said that "where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record." *Railway Co. v. Ramsay*, 22 Wall. 322; *Briges v. Sperry*, 95 U. S. 401. In *Brown v. Keene*, 8 Pet. 112, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive.

The present case was commenced in the supreme court of New York, and was thence removed, on the petition of the defendant, to the circuit court of the United States for the eastern district of New York. The record does not satisfactorily show the citizenship of the parties. The complaint filed in the state court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace, and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that state. The petition for the removal of the cause shows that the defendant is a corporation of the state of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some state or country unknown to defendant, but other than the state of Missouri. The record, however, fails to show of what state the plaintiffs are citizens.

They may be doing business in and have a residence in New York without, necessarily, being citizens of that state. They are not shown to be citizens of some state other than Missouri. *Bingham v. Cabot*, 3 Dall. 382; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Jackson v. Twentyman*, 2 Pet. 136; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450; *Hornthall v. Collector*, 9 Wall. 560; *Brown v. Keene*, *supra*; *Robertson v. Ccase*, *supra*.

It is true that the petition for removal, after stating the residence of the plaintiffs, alleges "that there is, and was at the time when this action was brought, a controversy therein between citizens of different states." But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which recites the names of the firm of Wm. R. Grace & Co., and describes it as "of the county of Kings and state of New York." If that bond may be considered as part of the record for the purpose of ascertaining the citizenship of the parties, the averment that the plaintiffs are "of the county of Kings and state of New York." is insufficient to show citizenship. *Bingham v. Cabot*, 3 Dall. 382; *Wood v. Wagnon*, 2 Cranch, 9; *Jackson v. Ashton*, *supra*.

As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate for the benefit of parties at another trial the conclusion reached by us on the merits. And we have called attention to the insufficient showing as to the jurisdiction of the circuit court, so that, upon the return of the cause, the parties may take such further steps, touching that matter, as they may be advised.

The judgment is reversed and the cause remanded, with directions to set aside the judgment, and for such further proceedings as may not be inconsistent with this opinion.

Cited with approval in *Anderson v. Watt*, 138 U. S. 694, 702.

In *Jackson v. Ashton*, 8 Pet. 148, the caption read, "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said *Thomas Jackson v. The Reverend William E. Ashton*, a citizen of the state of Pennsylvania; in equity," but in the body of the

bill of complaint it was stated that "the defendant is of Philadelphia," and the court held that the averment of citizenship was not sufficient, the caption being no part of the bill.

HORNE v. HAMMOND.

Reported in 155 U. S. 393.

(1894.)

THE case is stated in the opinion.

THE CHIEF JUSTICE: The title of this cause describes plaintiff in error as "of Chelsea in said district," and the decedent as "late of Chelsea," and the defendant as "a corporation organized under the laws of the state of Michigan." The writ and the original declaration do not appear in the record. The amended declaration commences thus: "Plaintiff says that she is the widow of the late Granville P. Horne of Chelsea, Suffolk county, commonwealth of Massachusetts, and that she was duly appointed by the probate court of Suffolk county administratrix of his estate."

As the transcript of the record does not show that the circuit court had jurisdiction of the suit, which depended upon the citizenship of the parties, and as counsel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the circuit court for further proceedings. *Robertson v. Cease*, 97 U. S. 646, 649; *Anderson v. Watt*, 138 U. S. 694, 702; *Timmons v. Elyton Land Co.*, 139 U. S. 378; *Denny v. Pironi*, 141 U. S. 121. Reversed and ordered accordingly.

In *Cooper v. Newell*, 155 U. S. 532, on the authority of *Horne v. Hammond*, 155 U. S. 393, the court held the following allegation of citizenship insufficient and reversed the judgment, viz.: "The petition of Stewart Newell, a resident citizen of the city of New York, in the state of New York, hereinafter styled plaintiff, complaining of Eliza Cooper, B. F. Cooper, and Fannie Westrope, all residents of Galveston county, in the state of Texas, and hereinafter styled defendants."

HARTOG v. MEMORY.

Reported in 116 U. S. 588.

(1885.)

THIS was a writ of error brought under paragraph five of the Act of March 3, 1875, ch. 137, 18 Stat. 370, for the review

of an order dismissing a suit begun in the circuit court. The record showed that on the 19th of September, 1884, William Hartog sued Henry Memory in an action of *assumpsit* for a breach of a contract to deliver property sold. In the declaration Hartog was described as a citizen of the Kingdom of Holland, and Memory as a citizen of Illinois. On the 8th of October Memory filed three pleas: 1, general issue; 2, statute of limitations of Illinois; and, 3, limitation laws of Holland, where the cause of action accrued. On the 8th of November Hartog obtained a commission for the taking of testimony in Holland, and Memory was ruled to file cross-interrogatories by the following Monday. On the 9th of May, 1885, Memory withdrew his plea of limitation by the laws of Holland, and Hartog filed a replication of the plea of the statute of limitations of Illinois. The case was on the same day tried with a jury. On the trial the plaintiff introduced "evidence to sustain the issues on his behalf, which evidence also showed that said plaintiff was a subject of the King of Holland, and also showed that said defendant had been doing business in the city of Chicago for several years.

"And thereupon said defendant offered himself as a witness to maintain the issues on his behalf in said cause, and during the progress of his examination he was asked by his counsel the following questions, and gave the following answers:

" 'Q. Are you a citizen of the United States, Mr. Memory?

" 'A. No, sir.

" 'Q. Of what dominion or kingdom are you a citizen?

" 'A. I am a citizen of Great Britain, sir.'

"And thereupon said plaintiff, by his counsel, cross-examined said Memory as follows:

" 'Q. How long have you resided and done business in Chicago?

" 'A. About from eight to ten years, I suppose.

" 'Q. Where did you do business before that?

" 'A. I did business for a short time in New York.'

"It also appeared that defendant was in Holland twice in 1879. and that the alleged contract was entered into there.

"Which was all the evidence introduced by either party on the question of citizenship or residence."

The jury, on the 11th of May, brought in a verdict against Memory for \$2,497. A motion for new trial was then entered. On the 1st of June, before judgment on the verdict, the defendant filed the following motion:

“And now comes the defendant, by his attorney, and it appearing that the defendant is not a citizen of the United States, or of any state, but a citizen and subject of Great Britain, and that all the parties to this suit are aliens, and that the court has no jurisdiction in this cause, the said defendant moves that this case be dismissed for want of jurisdiction in this court.”

This motion was granted, and the suit dismissed June 10. 23 Fed. Rep. 835. To reverse that order this writ of error was brought.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: After stating the facts in the language reported above, he continued: It was well settled before the Act of 1875 that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138, 143, and cases there cited. In its general scope this rule has not been altered by the Act of 1875, but before that act was passed it had been held that the rule prevented the courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the United States in the absence of a plea in abatement or to the jurisdiction, and, as that act “opened wide the door for frauds upon the jurisdiction of the court by collusive transfers so as to make colorable parties and create cases cognizable by the courts of the United States,” we held in *Williams v. Nottawa*, 104 U. S. 209, 211, that the statute changed the rule so far as to allow the court at any time, without plea and without motion, to “stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered.”

Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence.

the only purpose of which is to make out a case for dismissal. The parties can not call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.

If in the course of a trial it appears by evidence, which is admissible under the pleadings, and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit.

In *Williams v. Nottawa* the record showed that one of the issues to be tried was whether Williams, the plaintiff, was the real holder and owner of the bonds sued on, and the evidence showing the collusion, for which we ordered the suit to be dismissed, was all material and pertinent to that issue. And in *Farmington v. Pillsbury*, cited above, one of the defenses was that Pillsbury, the plaintiff, was not the *bona fide* holder of the coupons in suit, but that they were placed in his hands for the purpose of being sued on in the courts of the United States. This case came here on special findings applicable to that issue, and what we then said was in answer to the question certified on those findings.

Beyond this, no doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.

But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by

the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. *Barry v. Edmunds, ante, 550.* And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence.

Here the citizenship of both the plaintiff and the defendant, as it was in good faith understood by the plaintiff to be, was stated in the declaration, and it was such as if truly stated gave the court jurisdiction. The defendant pleaded to the merits. He alone knew of the mistake as to his citizenship, and purposely omitted to make it known at the time. Under the issues joined the question of citizenship did not and could not arise. If a judgment had been rendered on the verdict Memory would have been bound by it, notwithstanding both he and Hartog were aliens. The record would have estopped him from denying the jurisdiction of the court. The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case. It apparently came out incidentally without attracting the attention of the court at the time. The defendant suffered it to pass without special notice until after the verdict against him. He then moved for a new trial, not, so far as the record discloses, because of any errors at the trial, but, as we must presume, for the purpose of laying the foundation for his motion to dismiss; and the case appears to have been dismissed by the court solely upon the defendant's motion and the irrelevant testimony given at the trial, and without affording the plaintiff an opportunity to rebut or control that testimony.

Under these circumstances, as there is nothing else in the case to justify the dismissal of the suit, we are of opinion that the order dismissing the suit is erroneous, and must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

In *Morris v. Gilmer*, 129 U. S. 315, at p. 327, it is said in reference to *Hartog v. Memory*, "The failure, under the peculiar circumstances disclosed in that case, to give such opportunity (*i. e.*, to rebut or control the evidence upon the question of jurisdiction), was, itself, sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision and can not be regarded as authoritative. The court certainly did not intend in that case to modify or relax the rule announced in previous well considered cases."

MEXICAN CENTRAL RAILWAY v. DUTHIE.

Reported in 189 U. S. 76.

(1903.)

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: Duthie brought suit for the recovery of damages for personal injuries in the circuit court of the United States for the western district of Texas against the Mexican Central Railway Company, Limited; and in his original complaint averred that he "resides in El Paso, in El Paso county, state of Texas, in the western district of said state;" and that defendant was a citizen of the state of Massachusetts. The case was tried before a jury and resulted in a verdict and judgment thereon April 10, 1902. The record shows "that no further proceedings were had in said cause after the entry of said judgment until, to wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition," to the effect "that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said state and of the United States of America,' after the allegation made in said pleading 'that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the state of Texas.'"

The court granted leave to so amend and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, and to retain the judgment after such amendment; and a certificate was accordingly granted.

If the complaint or petition had remained as it was originally framed, and the case had then been carried to the circuit

court of appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend. *Metcalf v. Watertown*, 128 U. S. 586; *Horne v. Hammond Company*, 155 U. S. 393.

But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the circuit court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the circuit court had power to allow the amendment.

By Section 954 of the Revised Statutes it was provided that the trial court might "at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;" and since the trial court in the present case still had control of the record, it had jurisdiction to act, and we may add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. *Mexican Central Railway Company v. Pinkney*, 149 U. S. 194, 201; *Tremaine v. Hitchcock*, 23 Wall. 518. If the statutes of Texas forbade such an amendment, the law of the United States must govern. *Phelps v. Oaks*, 117 U. S. 236; *Southern Pacific Company v. Denton*, 146 U. S. 202.

The suggestion that defendant was cut off from trying the fact as to plaintiff's citizenship is without merit. The record does not disclose that defendant sought to contest plaintiff's affidavit, and for aught that appears the fact may have been conceded. *Judgment affirmed.*

In *Stuart v. Easton*, 156 U. S. 46, averment that plaintiff was a "citizen of London, England," was not sufficient to show alienage, and judgment was thereupon reversed.

In *Tug River Coal & Salt Co. v. Brigel*, 67 Fed. R. 625, the question of insufficient allegation of citizenship was for the first time raised in the circuit court of appeals, case was reversed and remanded with instructions to dismiss unless lower court should see fit to grant leave to amend. The question of jurisdiction may properly be raised on motion to set aside the judgment, and the court may order the judgment set aside and determine the question of jurisdiction, and if absence of jurisdiction is not shown, may then re-enter the judgment. But under rules of pleading in Ohio, the allegation concerning citizenship is material in federal courts, and general denial (as in this case) puts jurisdiction in issue, and a general verdict finding the issues in favor of the plaintiff, followed by

judgment thereon, is conclusive, where defendant did not in any manner raise the question of jurisdiction during the trial.

As to the power of a court to permit amendments to show diversity of citizenship, and the procedure upon such amendment, see *McEldowney v. Card*, 193 Fed. R. 475, 483.

As to the right to amend in the appellate courts and procedure thereon, see 38 Stat. L. 956, March 3, 1915, amending Judicial Code of the United States in Section 274 by adding clause C thereto, permitting such amendment at any stage.

(ee) Assignment or conveyance of interest.

BROWN'S LESSEE v. ARBUNKLE.

Reported in 1 W. C. C. 484 (Fed. Cases 1990).
(1806.)

(See foot note (b) 4 Dallas, p. 338.)

IN the case * * * it appeared, upon bill and answer on the equity side of the court, that the lessor of the plaintiff was a citizen of the state of New York, and the defendant was a citizen of Pennsylvania; that the former was a member of the population company, who had purchased extensive tracts of land, on the northwestern boundary of Pennsylvania; that the land so purchased was held by trustees (all citizens of Pennsylvania) for the use of the company; that the trustees had conveyed to the lessor of the plaintiff his portion of the land (including the premises mentioned in the declaration) in severalty; and that the present ejectment was founded upon that conveyance.

The defendant, upon these facts, and upon the authority of *Maxwell's Lessee v. Levy*, and *Hurst v. Hurst*, moved to strike from the record this ejectment, and others in the same predicament. But the motion was overruled by the court; and this distinction taken:

WASHINGTON, Justice: In the cases cited, the deeds were executed, with a collusive intention, to give a jurisdiction to the court, which the court could not possess without them. The objection proceeded on two grounds: 1st. On the equity of the statute provision, which declares, that a suit shall not be maintained in a federal court, by the assignee of a promissory note, or other chose in action (with the single exception of

foreign bills of exchange), unless it could have been brought there, by the original party; and 2d, on the manifest attempt, by a fraud, to create jurisdiction. But in the case now under consideration, the lessor of the plaintiff would have had a right as a citizen of New York, to apply to the equity side of the court, to compel the trustees to convey his share of the trust estate to him; and if the trustees have only voluntarily made a conveyance, which the court would have decreed, surely we can not call it a fraudulent deed, or refuse to take cognizance of a suit founded upon it, between a citizen of New York and a citizen of Pennsylvania.

McDONALD v. SMALLEY.

Reported in 1 Peters, 620.

(1828.)

MARSHALL, Chief Justice, delivered the opinion of the court: This suit was instituted in the circuit court of the United States for the seventh circuit, and district of Ohio, to obtain a conveyance of a tract of land, lying in what is termed “the military district;” claimed by the complainant under patent, younger than that under which it is held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan McArthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the court; and after hearing the parties upon this point, the court dismissed the bill, being of opinion, that its jurisdiction could not be sustained. From this decree, the complainant has appealed, and the cause is now before this court on the question of jurisdiction.

The bill states the complainant to be a citizen and resident of the state of Alabama, and the defendants to be citizens and residents of the state of Ohio. It has not been alleged, and certainly can not be alleged, that a citizen of one state, having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact, that he derives his title from a citizen of the state in which the lands lie; consequently, the single inquiry must be, whether the conveyance from McArthur to McDonald was real or fictitious?

The transaction, as laid before the court, appears to be this: McArthur was apprehensive that his title could not be sustained in the courts of the state, in which alone he could sue; and being indebted to McDonald in the sum of \$1,100, offered to sell and convey to him the land in controversy, in payment of this debt. The letter in which this offer was made, expresses the opinion that his title was good, and would most probably be established in the courts of the United States, but would fail in the courts of the state. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests, that if McDonald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors, who might be disposed to emigrate to Ohio; and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the courts of the United States. The contract was concluded by a letter, written in answer to that which has been stated, of which the said McDonald retained no copy. There was no special agreement between the plaintiff and McArthur when the deed was written, but perhaps some proposition by letter. He gave his bond to a third party for making a quitclaim title to the land, on condition of receiving from him \$1,100.

This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. McDonald could not have maintained an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court can not enter into them, when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different states.

The only part of the testimony which can inspire doubt, respecting its being an absolute sale, is the admission that the

plaintiff gave his bond to a third party for a quitclaim title to the land, on paying him \$1,100. We are not informed, who this third party was, nor do we suppose it to be material. The title of McArthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist, that it was for McArthur. The court can not act upon this suspicion. But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different states, it can not be doubted, that an ejectment, or a bill to foreclose, may be brought by the mortgagee, residing in a different state, in a court of the United States. Why then may he not sustain a suit in the same court, against any other person being a citizen of the same state with the mortgagor? We can perceive no reason why he should not. The case depends, we think, on the question, whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as mortgage. * * *

Conveyance of bare legal title to land to enable grantee to maintain suit in federal courts, does not confer jurisdiction of parties on such courts, being a species of fraud on the jurisdiction. *Maxfield's Lessee v. Levy*, 4 Dallas, 330 (1797).

(aaa) Under Judicial Code, Section 24.

TURNER v. BANK.

Reported in 4 Dallas, 8
(1799.)

THE chief justice delivered the opinion of the court, in the following terms:

ELLSWORTH, Chief Justice: The action below was brought by the president and directors of the Bank of North America, who are well described to be citizens of Pennsylvania, against Turner and others, who are well described to be citizens of North Carolina, upon a promissory note, made by the defendant, payable to Biddle & Co., and which, by assignment, be-

came the property of the plaintiffs. Biddle & Co. are not otherwise described, than as "using trade and merchandise in partnership together," at Philadelphia or North Carolina: and judgment was for the plaintiff. The error assigned, the only one insisted on, is, that it does not appear from the record, that Biddle & Co., the promisees, or any of them, are citizens of a state other than that of North Carolina, or aliens.

A circuit court, though an inferior court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution or jealousy of the courts at Westminster long applied to courts of that denomination; but are entitled to as liberal intendments or presumptions in favor of their regularity, as those of any supreme court. A circuit court, however, is of limited jurisdiction: and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid, further than its jurisdiction appears, or can be presumed, to set forth upon the record of a circuit court, the facts or circumstances which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if (as in the present case) the suit be upon a promissory note, by an assignee, to show that the original promisee is so: for by a special provision of the statute, it is his description, as well as that of the assignee, which effectuates jurisdiction.

But here, the description given of the promisee only is, that "he used trade" at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a citizen of a state, other than that of North Carolina, or an alien; nor anything which, by legal

intendment, can amount to such averment. We must, therefore, say that there is error. It is exceedingly to be regretted, that exceptions which might be taken in abatement, and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits. *Judgment reversed.*

SERÉ v. PITOT.

Reported in 6 Cranch, 332.
(1810.)

MARSHALL, Chief Justice, delivered the opinion of the court, as follows, viz.: This suit was brought in the court of the United States for the Orleans territory, by the plaintiffs, who are aliens, and syndics or assignees of a trading company composed of citizens of that territory, who have become insolvent. The defendants are citizens of the territory, and have pleaded to the jurisdiction of the court. Their plea was sustained, and the cause now comes on to be heard on a writ of error to that judgment.

Two objections are made to the jurisdiction of the district court. 1. That the suit is brought by the assignees of a chose in action, in a case where it could not have been prosecuted, if no assignment had been made. 2. That the district court can not entertain jurisdiction, because the defendants are not citizens of any state.

The first objection rests on the eleventh section of the Judicial Act, which declares "that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such a court, to recover the said contents, if no assignment had been made." The plaintiffs are admitted to be the assignees of a chose in action; but it is contended, that they are not within the meaning of the provision which has been cited, because this is a suit for cash, bills and notes, generally, by persons to whom the law transfers them, and not by such an assignee as is contemplated in the Judicial Act. The words of the act are said to apply obviously to assignments made by the party himself, on an actual note, or other chose in action, assignable by the proprietor thereof, and that the word "con-

tents'' can not, by any fair construction, be applied to accounts or unliquidated claims. Apprehensions, it is said, were entertained that fictitious assignments might be made to give jurisdiction to a federal court, and, to guard against this mischief, every case of an assignment by a party holding transferable paper, was excepted from the jurisdiction of the federal courts, unless the original holder might have sued in them.

Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the legislature, when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe, that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term "other chose in action," is broad enough to comprehend either case; and the word "contents," is too ambiguous in its import, to restrain that general term. The "contents" of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account.

The circumstance, that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a chose in action in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is, therefore, within the very terms of the law. The case decided in 4 Cranch, was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term "assignees," and are, therefore, not within the words of the act. That case, therefore, is not deemed a full precedent for this.

A suit to enforce the performance of a contract is a suit to recover the contents of a chose in action, within the meaning of Rev. Stat. U. S., Section 629. *Shoecraft v. Bloxham*, 124 U. S. 730.

In *New Orleans v. Gaines*, 138 U. S. 595, at p. 606, it is said: "Subrogation is not assignment. The most that can be said is, that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, however, the state or the governor of a state is a mere figure-head, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship. *Spear's Fed. Jud.* 150, 152, and cases there cited; *Coal Co. v. Blatchford*, 11 Wall. 172; *Rice v. Houston*, 13 Wall. 66; *Browne v. Strode*, 5 Cranch. 303; *Irvine v. Lowry*, 14 Pet. 293; *McNutt v. Bland*, 2 How. 9; *Huff v. Hutchinson*, 14 How. 586.

SHELDON v. SILL.

Reported in 8 Howard, 441.

(1850.)

MR. JUSTICE GRIER delivered the opinion of the court: The only question which it will be necessary to notice in this case is, whether the circuit court had jurisdiction.

Sill, the complainant below, a citizen of New York, filed his bill in the circuit court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the president of the Bank of Michigan.

Sheldon, in his answer, among other things, pleaded that "the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same state, and the complainant being assignee of them, the circuit court had no jurisdiction."

The eleventh section of the Judiciary Act, which defines the jurisdiction of the circuit courts, restrains them from taking "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee,

unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

The third article of the constitution declares that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish." The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies "controversies between citizens of different states."

It has been alleged, that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the constitution, and therefore void.

It must be admitted, that if the constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by congress must exercise all the judicial powers not given to the supreme court, or that congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, can not be in conflict with the constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has

been either directly advanced or tacitly assumed would be tedious and unnecessary.

In the case of *Turner v. Bank of North America*, 4 Dall. 10, it was contended, as in this case, that, as it was a controversy between citizens of different states, the constitution gave the plaintiff a right to sue in the circuit court, notwithstanding he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said—"The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress; and congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. United States*, 12 Pet. 616; *Cary v. Curtis*, 3 How. 245.

The only remaining inquiry is, whether the complainant in this case is the assignee of a "chose in action," within the meaning of the statute. The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.

It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the purpose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor.

In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or lien on the property mort-

gaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance.

The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the "assignee of a chose in action," within the letter and spirit of the act of congress under consideration, and can not support this action in the circuit court of the United States, where his assignor could not.

The judgment of the circuit court must therefore be reversed, for want of jurisdiction.

LAKE COUNTY COMMISSIONERS v. DUDLEY.

Reported in 173 U. S. 243.

(1899.)

HARLAN, Justice: * * * 2. There is, however, a ground upon which the right of Dudley to maintain this action must be denied.

By the fifth section of the above Act of March 3, 1875, it is provided "that if, in any suit, commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat. 470, 472, c. 137. This provision was not superseded by the Act of 1887, amended and corrected in 1888.

25 Stat. 433. *Lehigh Mining & Manfg. Co. v. Kelly*, 160 U. S. 327, 339.

Prior to the passage of the Act of 1875 it had been often adjudged that if title to real or personal property was put in the name of a person for the purpose only of enabling him, upon the basis of the diverse citizenship of himself and the defendant, to invoke the jurisdiction of a circuit court of the United States for the benefit of the real owner of the property who could not have sued in that court, the transaction would be regarded in its true light, namely, as one designed to give the circuit court cognizance of a case in violation of the acts of congress defining its jurisdiction; and the case would be dismissed for want of jurisdiction. *Marwell's Lessee v. Levy*, 2 Dall. 381; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, 80; *M'Donald v. Smalley*, 1 Pet. 620, 624; *Smith v. Kernochen*, 7 How. 198, 216; *Jones v. League*, 18 How. 76, 81; *Barney v. Baltimore City*, 6 Wall. 280, 288. These cases were all examined in *Lehigh Mining & Manfg. Co. v. Kelly*, 160 U. S. 327, 339. In the latter case it appeared that a Virginia corporation claimed title to lands in that commonwealth which were in the possession of certain individuals, citizens of Virginia. The stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania in order that the Pennsylvania corporation, after receiving a conveyance from the Virginia corporation, could bring suit in the circuit court of the United States sitting in Virginia, against the citizens in that commonwealth who held possession of the lands. The contemplated conveyance was made, but no consideration actually passed or was intended to be passed for the transfer. This court held that within the meaning of the Act of 1875 the case was a collusive one and should have been dismissed as a fraud on the jurisdiction of the United States court. It said: "The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the federal court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States, and as being

in law a fraud upon that court, as well as a wrong to the defendants. Such a device can not receive our sanction. The court below properly declined to take cognizance of the case." And this conclusion, the court observed, was "a necessary result of the cases arising before the passage of the Act of March 3, 1875."

From the evidence in this case of Dudley himself it is certain that he does not in fact own any of the coupons sued on and that his name, with his consent, is used in order that the circuit court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the board of commissioners of Lake county, could not invoke the jurisdiction of the federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire who could themselves have sued in the circuit court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the circuit court of the United States, and if all the causes of actions were thus united for the collusive purpose of making "a case" cognizable by the federal court as to every issue made in it, then the Act of 1875 must be held to apply, and the trial court on its own motion should have dismissed the case without considering the merits. * * *

We have held that if, for the purpose of placing himself in a position to sue in a circuit court of the United States, a citizen of one state acquires a domicile in another state without a present intention to remain in the latter state permanently or for an indefinite time, but with the present intention to return to the former state as soon as he can do so without defeating the jurisdiction of the federal court to determine his suit, the duty of the circuit court is on its own motion to dismiss such suit as a collusive one under the Act of 1875. *Morris v. Gilmer*, 129 U. S. 315. The same principle applies

where there has been a simulated transfer of a cause of action in order to make a case cognizable under the act.

The cases cited are decisive of the present one. As the coupons in suit were payable to bearer and were made by a corporation, Dudley being a citizen of New Hampshire could have sued the defendant, a Colorado corporation, in the circuit court of the United States without reference to the citizenship of his transferrers or the motive that may have induced the transfer of the coupons to him, or the motive that may have induced him to buy them, provided he had really purchased them. But he did not buy the coupons at all. He is not the owner of any of them. He is put forward as owner for the purpose of making a case cognizable by the federal court as to all the causes of action embraced in it. The apparent title was put in him without his knowledge and without his request, and only that he might represent the interests of the real owners. He never requested the execution of the pretended bills of sale referred to, nor did he hear of their being made until more than nine years after they were signed. And, notwithstanding the evasive character of his answers to questions, it is clear that his transferrers are the only real parties in interest and his name is used for their benefit. The transfer was collusive and simulated for the purpose of committing a fraud upon the jurisdiction of the circuit court in respect at least of part of the causes of action that make the case before the court.

For the reasons stated the trial court, when the evidence was concluded, should on its own motion have dismissed the suit. The judgment of the circuit court and the judgment of the circuit court of appeals must both be reversed and the cause remanded for a new trial and for further proceedings consistent with this opinion, and it is so ordered.

EMSHEIMER v. NEW ORLEANS.

Reported in 186 U. S. 33.

(1902.)

ALPHONSE EMSHEIMER, of New Orleans, an alien and a subject of the Empire of Germany, brought his bill in the United States circuit court in Louisiana, against the city of New Orleans, a municipal corporation created by the laws of Louisi-

ana, and a citizen of said state, praying that the liability of the city on certain certificates of indebtedness issued by said city, be enforced. Said certificates were made payable individually to various persons, all citizens of states other than Louisiana, enumerated in the bill, and by such persons assigned to the complainant.

New Orleans demurred to the bill on the ground, among others, that diversity of citizenship had not been sufficiently averred, and therefore the court had no jurisdiction, and this question, among others, was certified to the United States supreme court.

FULLER, Chief Justice: * * * The judicial power extends to controversies between citizens of different states; and between citizens of a state and citizens or subjects of foreign states; but the Judiciary Act of September 24, 1789, provided that the district and circuit courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," 1 Stat. 78, c. 20, 11; and the same provision of the Act of March 3, 1887, as corrected by that of August 13, 1888, is in these words: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 433-4, c. 866, 1.¹

To prevent abuse of the constitutional right to resort to the federal courts, jurisdiction in respect of assignees or transferees was thereby denied except as to suits upon foreign bills of exchange; suits upon choses in action payable to bearer and made by a corporation; and suits that might have been prosecuted in such court to recover the said contents if no assign-

ment or transfer had been made. *New Orleans v. Quinlan*, 173 U. S. 191.

The bill shows that at the time this suit was brought the circuit court had jurisdiction as between plaintiff and defendant, and also that the payees of these warrants might themselves then have instituted it, if there had been no assignment or transfer. We lay out of view as inapplicable the limitation on amount prescribed as to parties plaintiff by another clause with a different purpose.

But it is objected that the restriction relates to the time when the paper was assigned, and not to the time of the commencement of the suit; and that if there were intermediate assignees jurisdiction in respect of them must appear, and does not appear on the face of this bill.

We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and can not be divested by subsequent change of residence; but jurisdiction can not be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789.²

The general rule is that when a note or bill is endorsed in blank the *bona fide* holder of it may write an endorsement to himself or to another over the endorser's name, and where there are several endorsements in blank he may fill up the first one to himself or may deduce his title through all of them. *Evans v. Gee*, 11 Pet. 80; 1 Daniel Neg. Inst. (4th ed.), 693, 694, 694a.

However, this bill does not trace title through any intermediate assignee, and on the contrary does so directly from the original payees. It is true that there are averments that in a proceeding by one Goldstein, still pending and undisposed of in the circuit court, against other parties than the city of New Orleans, these claims, "now held" by complainant, were presented and proved, the master's report thereon being referred to but not set out; and also that in a suit by one Benjamin and certain intervenors brought against the city of New Orleans in the circuit court, and subsequently dismissed without prejudice, these claims, "since acquired and now held and owned by" complainant, were included; and while this

shows that these warrants must have passed through the hands of others than complainant, it does not appear that there was any endorsement of them other than in blank, and on the bill as framed complainant distinctly appears to be assignee of the payees. What complications may emerge hereafter in respect of the prior cases, or either of them, need not be considered.

We answer the first question by saying that on the face of the bill the circuit court had jurisdiction on the ground of diverse citizenship. *It will be so certified.*

¹ See Judicial Code, 1911, Section 24, Paragraph 1.

² Court here cites and discusses: *Chamberlain v. Eckert*, 2 Biss. 126; *White v. Leahy*, 3 Dillon, 378; *Jones v. Shapera*, 57 Fed. 457; *Portage Water Co. v. Portage*, 102 Fed. 769; *Milledollar v. Bell*, 2 Wall. Jr. 334; *Wilson v. Fisher*, Bald. 133; *Kirkman v. Hamilton*, 6 Pet. 20; *Mullen v. Torrance*, 9 Wh. 537; *Young v. Bryan*, 6 Wh. 146.

In *Noyes v. Crawford*, 133 Fed. 796 (1904), principle followed that citizenship of the assignor at the date of the commencement of the suit is the determining factor.

MORGAN v. GAY.

Reported in 19 Wallace, 81.

(1873.)

MR. JUSTICE STRONG delivered the opinion of the court:¹ The plaintiff is an assignee of the bills within the meaning of the eleventh section of the Judiciary Act of 1789, and by the express provisions of the section is not entitled to maintain his action in the circuit court, unless a suit might have been prosecuted in such court to recover the contents of the bills if no assignment had been made. But the petition does not show that the indorsers through whom the plaintiff claims were not citizens of Louisiana at the time the suit was brought. It is true, the citizenship of the defendant is averred to have been in Louisiana, and that of the plaintiff in Kentucky, but there is no averment of the citizenship of the payees of the bills, or of the citizenship of the subsequent indorsers. For aught that appears in the record, they may also be citizens of Louisiana; and, therefore, incapable of suing in the circuit court for that district to recover the contents of the bills. As that court **has** only a limited jurisdiction, it must appear

affirmatively that it may take cognizance of the controversy between the parties. In *Turner v. The Bank of North America*, it was distinctly ruled that when an action upon a promissory note is brought in a federal court by an indorser against the maker, not only the parties to the suit, but also the citizenship of the payee, and the indorser, must be averred in the record to be such as to give the court jurisdiction. The same rule was asserted in *Montalet v. Murray*, in *Mollan v. Torrance*, and in *Gibson, et al., v. Chew*. The judgment must, therefore, be reversed, and the cause sent back that amendment may be made in the pleadings showing the citizenship of the indorser of the bills, if it be such as to give the court jurisdiction of the case. * * *

Judgment reversed, and the cause remanded for further proceedings, *in accordance with this opinion*.

¹ Two of the bills of exchange sued on in this case were indorsed by the payees, and the third by its payee and by other indorsers, but the petition said nothing about the citizenship of the payees of the bills, nor, in the case of the third bill, of the citizenship of the subsequent indorsers.

In the case of *Milledollar v. Bell*, Fed. Case 9549 (C. C. D. N. J., 1852), there were seven intermediate assignments of a bond and mortgage, yet the court speaking through Grier, Circuit Justice, held that it is necessary only to aver the citizenship of the maker (defendant), the plaintiff, and the payee, and the "citizenship of the intermediate holders, owners, or assignees is immaterial, and need not be averred." The early authorities are discriminated.

See, for discriminatory review of the cases, *Tarr v. Hobe-Peters Land Co.*, 188 Fed. 10 (1911), in which the court holds that it is sufficient to aver citizenship of defendant (maker) and the plaintiff, his immediate assignor, and the original holder, without inclusion of the intermediate assignees.

In *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113 (1904), the various enactments relating to assignments and the decisions thereunder as to what is a chose in action are discussed, and the court holds that a suit may be maintained on an oral contract by the assignee thereof.

PARKER v. ORMSBY.

Reported in 141 U. S. 81.

(1891.)

MR. JUSTICE HARLAN delivered the opinion of the court:
By an act of congress approved February 25, 1889, it was

provided that in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of that court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States to review the judgment or decree without reference to its amount; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, this court is not to review any question raised upon the record except such question of jurisdiction. 25 Stat. 693, c. 236.

This case comes here under that act. The question of the jurisdiction of the circuit court, in which this suit was brought, arises out of the following facts: C. M. Parker executed at Lincoln, Nebraska, September 7, 1886, his promissory note for \$2,000, payable on the 7th day of September, 1891, with semi-annual interest from date at the rate of eight per cent. per annum, the interest coupons and the note being payable to Walter J. Lamb or order, at the Lancaster County Bank, in Lincoln, Nebraska. It was provided in the note that any interest coupon not paid when due should bear interest at the rate of eight per cent. per annum from maturity; and if any interest remained unpaid for thirty days after it matured the holder could elect to consider the whole debt due and collectible at once; also, that in case an action was brought for the collection of the note, the maker was to pay, as attorney's fees, a sum equal to ten per cent. of the amount due. The note and interest coupons were secured by a mortgage given by Parker and wife upon real estate in the city of Lincoln.

Upon the back of the note and coupons were the following endorsements: "Pay L. L. Ormsby or order. Lancaster County Bank, Lincoln, Neb. F. O. Metcalf, cashier. Pay Lancaster County Bank or order. I waive demand, notice, protest and notice of protest, and guarantee the payment of the within note. W. J. Lamb."

The whole debt having become due by reason of default in meeting the interest, this suit was brought, December 13, 1889, by Lucinda L. Ormsby against the appellants, Charles M. Parker and Emma Parker, his wife, and Martha L. Court-

ney, the relief sought being a decree for the sale of the mortgaged premises to pay the amount due, and for a personal judgment against Charles M. Parker for any deficiency remaining after the sale.

The bill avers that the plaintiff is a citizen of Illinois, and that the defendants are citizens of Nebraska. It contains, however, no averment as to the citizenship of Lamb, the original payee in the note and coupons as well as the mortgagee.

A decree was rendered finding due the plaintiff the sum of \$2,520.80, the aggregate of the principal and interest of the note and coupons and costs, including attorney's fees. The mortgaged premises were ordered to be sold to raise that sum.

Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear, upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act. *Mansfeld, etc., Railway Co. v. Swan*, 111 U. S. 379, 382; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226; *Cameron v. Hodges*, 127 U. S. 322, 325.

The Judiciary Act of 1789 provided that the district and circuit court of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 78, c. 20, 11. The Act of March 3, 1875, provided that no circuit or district court should "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470, c. 137, 1. The provision in the Act of March 3, 1887, determining the jurisdiction of the circuit courts of the United States and for other purposes, as amended by that of August 13, 1887,

determining the jurisdiction of the circuit courts of the United States and for other purposes, as amended by that of August 13, 1888, is in these words: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 433, 434, c. 866, 1.

It thus appears that the Act of 1887, in respect to suits to recover the contents of promissory notes or other choses in action, differs from the Act of 1789 only in the particular that the Act of 1887 excludes, under certain circumstances, from the cognizance of the circuit and district courts of the United States suits in favor "of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation." It is not necessary now to consider the meaning of the words just quoted; for the present suit is by an assignee of a promissory note payable, not to bearer, but to the order of the payee. And we have only to inquire as to the circumstances under which the court below could take cognizance of a suit of that character. That inquiry is not difficult of solution.

It was settled by many decisions, under the Act of 1789, that a circuit court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appeared, affirmatively that it could have been maintained in that court in the name of the original payee. *Turner v. Bank of North America*, 4 Dall. 8, 11; *Montalet v. Murray*, 4 Cranch, 46; *Gibson v. Chew*, 16 Pet. 315, 316; *Coffee v. Planters' Bank of Tennessee*, 13 How. 183, 187; *Morgan's Executor v. Gay*, 19 Wall. 81, 82. There were these recognized exceptions to that general rule in its application to promissory notes: 1. That an endorsee could sue the endorser in the circuit court, if they were citizens of different states, whether a suit could have been brought or not by the payee against the maker; for the endorsee would not claim through an assignment, but by virtue of a new contract between himself and

the endorser. *Young v. Bryan*, 6 Wheat. 146, 151; *Mullen v. Torrance*, 9 Wheat. 537, 538. 2. The holder of a negotiable instrument payable to bearer or to a named person or bearer could sue the maker in a court of the United States, without reference to the citizenship of the original payee or original holder, because his title did not come to him by assignment, but by delivery merely. *Bank of Kentucky v. Wister*, 2 Pet. 318, 326; *Thompson v. Perrine*, 106 U. S. 589, 592, and authorities there cited. There can be no claim that the present case is within either of those exceptions.

The authorities we have cited are conclusive against the right of the plaintiff to maintain this suit in the court below, unless it appeared that the original payee, Lamb, could have maintained a suit in that court upon the note and coupons. Consequently, it was necessary that the record should, as it does not, disclose his citizenship. *Metcalf v. Watertown*, 128 U. S. 586; *Stevens v. Nichols*, 130 U. S. 230; *Crehore v. Ohio & Mississippi Railway*, 131 U. S. 240, 243; *Rollins v. Chaffee County*, 34 Fed. Rep. 91. If it be true, as stated in an affidavit filed below, that Lamb was, at the commencement of the suit, a citizen of Nebraska, clearly the court below was without jurisdiction; for all the defendants are alleged to be citizens of that state.

The assignment by the *cestui que trust* of an interest in a personal estate does not fall within the inhibition of Judicial Code, Section 24, and the assignee thereof may sue in the federal courts, inasmuch as it is not the assignment of a chose in action. See *Brown v. Fletcher*, 235 U. S. 589.

In *Holmes v. Goldsmith*, 147 U. S. 150, suit was against the accommodation maker resident of the same state as the payee who had indorsed to plaintiff, citizen of another state; here the payee could not in any case have sued the maker on the note, and jurisdiction in the federal court was upheld.

(b) Artificial persons.

(aa) The corporation.

ST. LOUIS AND SAN FRANCISCO RAILWAY v. JAMES.

Reported in 161 U. S. 545.

(1896.)

ON December 24, 1892, Etta James, defendant in error, brought this action in the circuit court for the western district

of Arkansas against the St. Louis and San Francisco Railway Company, plaintiff in error, for negligence in maintaining a switch target at Monett, in Barry county, in the state of Missouri, so near its tracks that her husband was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. Her husband resided at Monett and died intestate. The defendant in error was the widow and sole heir at law of her husband, and no administrator of his estate was appointed in Arkansas. She recovered a judgment of \$5,000.

Etta James, the defendant in error, resided at Monett, and was a citizen of the state of Missouri. Monett is a station in Missouri, on the railroad of the plaintiff in error, about fifty miles from the southern border of that state.

The St. Louis and San Francisco Railway Company was organized and incorporated under the laws of the state of Missouri in 1876, and soon thereafter became the owner of and has ever since owned and operated a railroad in that state extending from Monett southerly to the southern border of the state of Missouri.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court: Etta James, as a citizen of the state of Missouri, and having a cause of action against the St. Louis and San Francisco Railway Company, a corporation of the state of Missouri, could, of course, sue the latter in the courts of that state, but equally, of course, could not sue such state corporation in the circuit court of the United States for the district of Missouri. Can she, as such citizen of the state of Missouri, lawfully assert her cause of action in the circuit court of the United States for the district of Arkansas against the St. Louis and San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the state of Arkansas on railroad corporations of other states coming within her borders and complying with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis and San Francisco Railway Company, though denying the plaintiff's right to sue it in the circuit court of Arkansas, waives

its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the federal courts, a state corporation is deemed to be indisputably composed of citizens of such state. It is equally true that, without objection so far from the federal authority, whether legislative or judicial, it has become customary for a state, adjacent to the state creating a railroad corporation, to legislatively grant authority to such foreign corporation to enter its territory with its road—to make running arrangements with its own railroads—to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state.

We have already said that the rule that state corporations are undisputably composed of citizens of the states creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

In the case of *Bank of the United States v. Deveaux*, 5 Cranch, 61, 87, 88, where an action had been brought against citizens of the state of Georgia in the circuit court of the United States for the district of Georgia, by a petition of "the president, directors, and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the state of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the circuit court of the United States, and Chief Justice Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."

Before leaving this case it should be noted that the United States Bank was not a corporation of the state of Pennsylvania, but of the United States. The decision, therefore, was to the

effect that where it appeared that a corporation plaintiff, regardless of its origin, was composed of aliens or of citizens of a different state from the defendant, the plaintiff, though suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different state, and such averment, if not traversed, would sustain the jurisdiction. The principle of the case makes the individual corporators the real parties to the suit.

In *Louisville, Cincinnati, etc., Railroad v. Letson*, 2 How. 497, 555, an action was brought, in the circuit court of the United States for the district of South Carolina, by a citizen of the state of New York against a corporation whose members were alleged to be citizens of South Carolina. A plea to the jurisdiction was set up that there were members of the defendant company who were not citizens of the state of South Carolina, but of another state than New York or South Carolina. In the opinion in this case, *Bank of the United States v. Deveaux* was said to have gone too far, and that consequences and inferences had been argumentatively drawn from it which ought not to be followed, and it was said that "a corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and, therefore, entitled, for the purpose of suing and being sued, to be deemed a citizen of that state," and accordingly the judgment of the circuit court, overruling the plea to its jurisdiction, was sustained.

Marshal v. Baltimore & Ohio Railroad, 16 How. 314, 329, was a case tried in the circuit court of the United States for the district of Maryland, wherein the plaintiff alleged that he was a citizen of the state of Virginia, and that the Baltimore and Ohio Railroad Company, the defendant, was a body corporate by an act of the general assembly of Maryland, and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in *Louisville Railroad Company v. Letson*, 2 How. 497, sanctioned it, or, if some of the doctrines there advanced seemed to do so, it was said that they were extrajudicial, and, therefore, not authori-

tative. Several judges dissented, but the court, speaking through Mr. Justice Grier, held that "if the declaration set forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that 'the defendants are a body corporate by the act of the general assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that state."

In *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233, Chief Justice Taney, speaking for the court, said: "The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of the *Hope Insurance Company v. Boardman*, and of the *Bank of the United States v. Deveaux*, 5 Cranch, 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last mentioned case the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit brought by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators were not named in the suit or the averment.

"But in the case of the *Louisville Railroad Company v. Letson* the court overruled as much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiff or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. And that inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it

ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicile of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the state from which this legal being derived its existence and its faculties and powers.”

The previous cases were reviewed in *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286, 297. That was the case of an action brought in the circuit court of the United States for the district of Indiana against Wheeler, a citizen of that state, to recover the amount due on his subscription to stock of the Ohio and Mississippi Railroad Company. The declaration described the plaintiffs as “the president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio.” The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the state of Ohio, in the first instance, had been incorporated by an act of assembly of the state of Indiana, and thus had become a body corporate of the same state whereof he was a citizen.

The question thus raised was on a certificate of a division of opinion, between the judges of the circuit court, brought to this court, and was answered as follows: “This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state. Such an action can not be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in

both states. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law or under the decision of this court in the case of the *Bank of Augusta v. Earle*. It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of those states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company are, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they can not be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States. * * * And we shall certify to the circuit court that it has no jurisdiction of the case on the facts presented by the pleadings."

Memphis & Charleston Railroad v. Alabama, 107 U. S. 581, 585, was where an action had been brought by the state of Alabama, for the use of a county of that state, in a court of that state, against a railroad corporation whose road passed through that state and county, to recover the amount of a county tax assessed upon its property; and the cause was removed into the circuit court of the United States for the northern district of Alabama; and upon motion the cause was remanded to the state court upon the ground that the defendant, although incorporated in Tennessee also, was a corporation of the state of Alabama. On error the judgment of the court below was affirmed, and this court, per Mr. Justice Gray, said: "The

defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of the state of Alabama, which can not sue or be sued by another citizen of Alabama in the courts of the United States.”

In this case, *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286, and *Railway Company v. Whitton*, 13 Wall. 270, were cited. The former has already been noticed, and of the latter it may be said, by way of distinguishing it from the present case, that while it was held that a citizen of Illinois might sue the railroad company in the circuit court of Wisconsin, although the company had been likewise incorporated in Illinois, yet the cause of action arose in Wisconsin—nor does it appear in the report of that case what was the character of the legislation by which the Wisconsin company was created, nor was the question now before us there considered. It is also observable that in the latter case *Ohio & Mississippi Railroad v. Wheeler* was cited with approval.

One phase of the subject was before the court in the case of the *Pennsylvania Co. v. St. Louis, etc., Railroad*, 118 U. S. 290, 295. A suit had been brought in the circuit court of the United States for the district of Indiana, by the St. Louis, Alton and Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the state of Illinois, and a citizen of that state, against the Indianapolis and St. Louis Company, a corporation organized under the laws of the state of Indiana, and a citizen of that state, and against other corporations mentioned in the bill as citizens of Indiana, or of other states than Illinois. An objection to the jurisdiction was made on the ground that the St. Louis, Alton and Terre Haute Railroad Company was organized under the laws of both Illinois and Indiana, and was therefore a citizen of the latter state. In treating this question this court said, by Mr. Justice Miller: “It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build

a railroad across the state from the Mississippi river to its eastern boundary, may by permission of the state of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire state, * * * without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana as have been conferred on it by the state which created it, constitutes it a corporation of the state of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

So in *Nashua Railroad v. Lowell Railroad*, 136 U. S. 356, it was held that railroad corporations, created by two or more states, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it was created, and the union of name, of officers, of business and property does not change their distinctive character as separate corporations.

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing

in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the constitution of the United States which confers jurisdiction upon the federal courts in "controversies between citizens of different states."

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress, regarded as within the constitutional prohibition of agreements or compacts between states.

Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then,

after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

Approved and followed in *Louisville Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 566, 576; and see *Baldwin v. Pacific Light & Power Co.*, 199 Fed. 291.

A corporation is not a "citizen" within the meaning of the federal constitutional provision guaranteeing to the "citizens" of a state the privileges and immunities of citizens of the several states. *Paul v. Virginia*, 8 Wall. 169; *Ducat v. Chicago*, 10 Wall. 410.

Corporation remains citizen of state of original incorporation for federal jurisdictional purposes, notwithstanding the statutes of another state defining conditions and results of doing business in that state. *Southern Ry. v. Allison*, 190 U. S. 326, and *Missouri Pac. Ry. Co. v. Castle*, 224 U. S. 541.

See case where a railway is incorporated in two states simultaneously and freely in *Patch v. Wabash Ry. Co.*, 207 U. S. 277.

In *Railway v. Koontz*, 104 U. S. 5, is an excellent discussion of the citizenship of a corporation, and the effect thereon of incorporation in several states.

BALDWIN v. CHICAGO & N. W. RY. CO.

Reported in 86 Federal, 167.

(1898.)

SEVERNS, District Judge: The plaintiff, who brings this suit, is a citizen of the state of Michigan. The defendant is a corporation, resulting from the consolidation of three railway corporations previously existing, one in each of the several states of Illinois, Wisconsin, and Michigan, and organized under the laws of said states respectively. The consolidation was also authorized by the laws of each of the said states. The defendant is sued in the state of Michigan, and pleads to the jurisdiction of the court that, being sued here, it must be regarded as a citizen of Michigan, and that, as the plaintiff is also a citizen of this state, the suit can not be maintained. I am of opinion that this objection must prevail. It is true that the defendant is, for the general purposes of jurisdiction, a citizen of each state by virtue of whose laws it was consolidated; but, when suit is brought against it in any of those states, it is regarded as the creature of the laws of that state, and its corporate existence elsewhere is ignored. Thus, when suit is brought against the

defendant railway company, organized as it is, in the courts of Michigan, it is treated as a citizen of that state. The case of *Williamson v. Krohn*, 13 C. C. A. 668, 66 Fed. 655, illustrates this. Krohn, a citizen of Ohio, brought suit in the federal court in Kentucky against several defendants, one of which was the Central Railway & Bridge Company, a company constituted by the consolidation of an Ohio corporation with one in Kentucky under laws authorizing it in each of those states. It was held that the suit was rightly brought in Kentucky. So in the case of *Muller v. Dows*, 94 U. S. 444. The suit was brought in the United States circuit court in Iowa, by three persons, two of whom were citizens of New York and one was a citizen of Missouri. One of the defendants, the Chicago & Southwestern Railway Company, was consolidated by the union of two corporations, one of Iowa and the other of Missouri, under the laws of the two states, respectively, authorizing the consolidation. The supreme court held that the suit was properly brought in the federal court of Iowa. In that case reference was made to *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, where suit was brought in the federal circuit court in Wisconsin, by a citizen of Illinois against the Chicago & Northwestern Railway Company, which is also the defendant in the present suit. Then, as now, it was a corporation consolidated under the laws of Illinois, Wisconsin, and Michigan. The plaintiff's right to bring the suit was contested upon the ground that the defendant was a citizens of Illinois, the same state as that of the plaintiff. But the objection was overruled, and on appeal the ruling was confirmed. Mr. Justice Field, in delivering the opinion of the supreme court, after stating the contention of the defendant, said:

"The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and, as such, a citizen of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there such, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

This statement of the law contains the gist of the whole matter. These propositions were reaffirmed in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct.

1094. The plaintiff was a citizen of Illinois. The defendant, the Indianapolis & St. Louis Company, was a citizen of Indiana. It was an admitted fact that it was also a citizen of Illinois. This fact was held to create no difficulty. But it was further claimed that the plaintiff was not only a citizen of Illinois, but of Indiana also. Mr. Justice Miller, who delivered the opinion of the court, was at pains to show that this claim was not supported by the facts, but said that, if it were so, it was not settled that the plaintiff could not rely upon its Illinois citizenship to maintain the suit. In the present case the plaintiff has no other citizenship than that of Michigan, where the suit is brought. It may be added that it is the necessary, and logical corollary of the doctrine on which the decisions in the above cases rest, namely, that the court looks only to the law of the state in which the suit is brought for the purpose of determining the citizenship of the corporation in such cases, that a citizen of one of the states in which the corporation exists can not maintain a suit against it in the federal courts of the state whereof he is himself a citizen. The result is that the plea must be sustained, and the cause dismissed, for want of jurisdiction.

In *Chicago, Rock Island & Pacific Ry. v. Stephens*, 218 Fed. R. 535, the following allegation of citizenship is held insufficient, concerning the defendant railway company, viz., "a corporation existing and doing business in the State of Arkansas and Tennessee;" and as amended "is a citizen of the State of Arkansas," is still insufficient.

DOCTOR v. HARRINGTON.

Reported in 196 U. S. 579.

(1905.)

"THIS action was brought by the appellants, as stockholders of the Sol Sayles Company, a corporation organized under the laws of the state of New York, for the purpose of vacating and setting aside a judgment obtained by the appellees Harrington against the Sol Sayles Company in the supreme court of the state of New York, on October 28, 1902, and the levy and sale under an execution issued thereunder, and of requiring the appellees Harrington to deliver to the Sol Sayles Company certain shares of stock in the Sayles, Zahn Company, and certain bonds, belong-

ing to the Sol Sayles Company, which had been sold under such execution, and for other equitable relief.

“In substance, the complainants allege in their bill of complaint that they are citizens of Morris county, New Jersey; that the defendants Harrington are citizens of the state of New York, and that the defendants Sol Sayles Company and Sayles, Zahn Company are likewise citizens of said state, both being incorporated under the laws of that state; * * *.”

The bill in this case was dismissed by the circuit court on the ground that it had no jurisdiction upon the fact alleged, and certified to this court the question of jurisdiction. The following is the question certified:

“Whether or not the complainants’ bill of complaint showed that there was such diversity of citizenship between the parties complainant and parties defendant in this cause as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States circuit court for the southern district of New York, of this cause.”

The court further certified that it entered a decree dismissing the bill, “holding that it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and defendant as would confer jurisdiction upon the United States circuit court for the southern district of New York in the cause within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same state would thus be parties on both sides of the litigation, and thus deprive this court of jurisdiction.

MR. JUSTICE McKENNA, after stating the case, delivered the opinion of the court: To sustain the action of the circuit court in dismissing the bill the argument is as follows: (1) By a conclusive presumption of law the stockholders of a corporation are deemed to be citizens of the state of the corporation’s domicile. (2) Granting that the complainants are citizens of New Jersey, yet as they are suing for the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is in legal effect on the same side of the controversy as the complainants, and since it is a citizen of the same state as the

other defendants, the circuit court had no jurisdiction, as the suit does not involve a controversy between citizens of different states.

1. This is based on the assumption adopted by this court, that stockholders of a corporation are citizens of the state which created the corporation—an assumption physically possible but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law and subject to one of their fundamental maxims, and can not be carried beyond the reasons which caused its adoption necessarily requisite. It is, however, more of a presumption than a fiction, but whether we regard it as either it can not be pushed to the end contended for by appellees.

The reason of the presumption (we will so denominate it) was to establish the citizenship of the legal entity for the purpose of jurisdiction in the federal courts. Before its adoption difficulties had been encountered on account of the conditions under which jurisdiction was given to those courts. A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. It can sue and be sued. At first this could be done in the circuit court of the United States only when the corporation was composed of citizens of the state which created it. *Bank of United States v. Deveaux*, 5 Cranch, 61; *Hope Insurance Company v. Boardman*, 5 Cranch, 57. But the limitation came to be seen as almost a denial of jurisdiction to or against corporations in the federal courts, and in *Louisville etc., Railroad Company v. Letson*, 2 How. 497, prior cases were reviewed; and this doctrine laid down:

“That a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, * * * capable of being treated as a citizen of that state, as much as a natural person.” And “when the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction.”

The presumption that the citizenship of the corporators should be that of the domicile of the corporation was not then formu-

lated. That came afterwards, and overcame the difficulty and objection that the legal creation, the corporation, could not be a citizen within the meaning of the constitution. *Marshall v. B. & O. Railroad Company*, 16 How. 314. This, then, was its purpose, and to stretch beyond this is to stretch it to wrong. It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the constitution of the United States. Disregarding the purpose of the presumption, it is easy to represent it, as counsel does, as illogical if not extended to every stockholder; but as easy it would be to show its falseness if so applied. But such charges and countercharges are aside from the question. To the fact and place of incorporation the law attaches its presumption for a special purpose. Perhaps, as intimated in *St. Louis & San Francisco Ry. v. James*, 161 U. S. 545, 563, this "went to the very verge of judicial power." Against the further step urged by appellees we encounter the constitution of the United States.

(aaa) Doing business.

LAFAYETTE INSURANCE CO. v. FRENCH.

Reported in 18 Howard, 404.

(1855.)

MR. JUSTICE CURTIS delivered the opinion of the court: This is a writ of error to the circuit court of the United States for the district of Indiana, in an action of debt on a judgment recovered in the commercial court of Cincinnati, in the state of Ohio. In the declaration, the plaintiffs are averred to be citizens of Ohio; and they "complain of the Lafayette Insurance Company, a citizen of the state of Indiana." This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation; or, if it be such, by the law of what state it was created. The averment, that the company is a citizen of the state of Indiana, can have no sensible meaning attached to it. This court does not hold, that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution.

And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed. But the plaintiff's replication alleges that the defendants are a corporation, created under the laws of the state of Indiana, having its principal place of business in that state. These allegations are confessed by the demurrer; and they bring the case within the decision of this court in *Marshall v. The Baltimore and Ohio Railroad Company*, 16 How. 314, and the previous decisions therein referred to.

Upon the merits, it was objected that the judgment declared on was rendered by the commercial court of Cincinnati, without jurisdiction over the person sued; and the argument was, that as this corporation was created by a law of the state of Indiana, it could have no existence out of that state, and, consequently, could not be sued in Ohio.

The precise facts upon which this objection depends are that this corporation was created by a law of the state of Indiana, and had its principal office for business within that state. It had also an agent authorized to contract for insurance who resided in the state of Ohio. The contract on which the judgment in question was recovered was made in Ohio, and was to be there performed; because it was a contract with the citizens of Ohio to insure property within that state. A statute of Ohio makes special provision for suits against foreign corporations, founded on contracts of insurance there made by them with citizens of that state; and one of its provisions is, that service of process on such resident agent of the foreign corporation shall be "as effectual as though the same were served on the principal."

The question is, whether a judgment recovered in Ohio against the Indiana corporation, upon a contract made by that corporation in Ohio with citizens of that state to insure property there, after the law above mentioned was enacted—service of process having been made on such resident agent—is a judgment entitled to the same faith and credit in the state of Indiana as in the state of Ohio, under the constitution and laws of the United States.

No question has been made that this judgment would be held binding in the state of Ohio, and would there be satis-

fied out of any property of the defendants existing in that state.

The Act of May 26, 1790 (1 Stats. at Large, 122), gives to a judgment rendered in any state such faith and credit as it had in the courts of the state where it was recovered. But this provision, though general in its terms, does not extend to judgments rendered against persons not amenable to the jurisdiction rendering the judgments. *D'Arcy v. Ketchum*, 11 How. 165. And, consequently, notwithstanding the act of congress, whenever an action is brought in one state on a judgment recovered in another, it is not enough to show it to be valid in the state where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the state, or had legal notice of the suit, and was in some way subject to its laws, so as to be bound to appear and contest the suit, or suffer a judgment by default. In more general terms, the doctrine of this court, as well as of the courts of many of the states, is, that this act of congress was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another.

This corporation, existing only by virtue of a law of Indiana, can not be deemed to pass personally beyond the limits of that state. *Bank of Augusta v. Earle*, 13 Pet. 519. But it does not necessarily follow that a valid judgment could be recovered against it only in that state. A corporation may sue in a foreign state, by its attorney there; and if it fails in the suit, be subject to a judgment for costs. And so if a corporation, though in Indiana, should appoint an attorney to appear, in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a judgment, in all respects as obligatory as if the defendant were within the state. The inquiry is, not whether the defendant was personally within the state, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear or suffer a judgment by default.

And the true question in this case is, whether this corporation had such notice of the suit, and was so far subject to the jurisdiction and laws of Ohio, that it was bound to appear, or take the consequences of nonappearance.

A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.

In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law. It can not be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that state, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the state, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.

Nor do we think the means adopted to effect this object are open to the objection, that it is an attempt improperly to extend the jurisdiction of the state beyond its own limits to a person in another state. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the

corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts; and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the corporation there in respect to such service; and notice to him was notice to the corporation which he there represented, and for whom he was empowered to take notice.

We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contracts in Ohio, the corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice, to be as valid as if the corporation had had its habitat within the state; that is, entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States.

We limit our decision to the case of a corporation acting in a state foreign to its creation, under a law of that state which

recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents. The case of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion.

This decision renders it unnecessary to consider the questions arising under the counts on the policy. * * *

ST. LOUIS SOUTHWESTERN RAILWAY v. ALEXANDER.

Reported in 227 U. S. 218.

(1913.)

MR. JUSTICE DAY delivered the opinion of the court: The defendant in error, Alexander, filed his complaint against the plaintiff in error, St. Louis Southwestern Railway Company of Texas, a Texas corporation, in the supreme court of New York county to recover damages for loss sustained by him arising from the alleged negligence of the railway company in failing to properly ice and re-ice certain poultry shipped from Waco, Texas, to New York City under a bill of lading given by the railway company to the shipper, the Texas Packing Company. Upon the petition of the railway company the case was removed to the circuit court of the United States for the southern district of New York. That court denied a motion to vacate and quash service of summons and to dismiss for want of jurisdiction, and upon trial judgment was entered for the defendant in error. The district court, succeeding to the jurisdiction of the circuit court, allowed a writ of error and certified to this court the question of jurisdiction under 238 of the Judicial Code (March 3, 1911, c. 231, 36 Stat. 1087).

When the plaintiff in error received the poultry from the Texas Packing Company at Waco on November 25, 1910, for shipment to New York City, it delivered to the packing company a through bill of lading in which it acknowledged receipt of the property and agreed to carry the freight "to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destina-

tion," and in which was set out, among others, the following conditions:

"Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

"Sec. 3. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property. * * * Unless claims are so made the carrier shall not be liable."

The route, as shown by the bill of lading, was "Cotton Belt to East St. Louis, care of Big Four East St. Louis, care of Nickel Plate Route." On December 5, 1910, the freight was delivered in a damaged condition to the defendant in error, to whom the bill of lading had been endorsed.

Alexander brought suit on July 10, 1911, against the plaintiff in error in the supreme court of New York county and caused summons to be served upon Lawrence Greer, one of the directors of the plaintiff in error residing in New York, in accordance with the laws of New York. Subsequently the case was removed to the United States circuit court on the ground of diversity of citizenship. The plaintiff in error filed a motion to vacate and quash the attempted service of summons and to dismiss the cause "for want of jurisdiction over the person of said St. Louis Southwestern Railway Company of Texas, for the reason that said St. Louis Southwestern Railway Company of Texas is a foreign corporation, organized and existing under the laws of the state of Texas, is not doing business within the state of New York, is not found within said state and is not amenable to service therein, and has not waived due service of summons herein by voluntary appearance or otherwise." The circuit court denied the motion, holding that the service was in accordance with the New York laws, provided the action arose in that state, and that the action did so arise, for, although the contract was made in Texas, it called for delivery in New York, and the bill of lading required that the claim to be presented to the carrier

at the point of delivery; and holding further that, upon the authority of *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, and *Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Meyer*, 197 U. S. 407, under the Carmack amendment to the Hepburn Act (June 29, 1906, 34 Stat. 584, 595, c. 3591, 20), the plaintiff in error was doing business in the state of New York to the extent that the federal courts acquired jurisdiction of a removal cause in which summons had been served in accordance with the state laws.

After an answer had been filed by the plaintiff in error, trial was had in the district court (the Judicial Code having become effective), the plaintiff in error duly renewing, at the opening of the trial and subsequent stages, its motion to vacate and quash the service and to dismiss the action for want of jurisdiction, which was denied upon the authority of the prior order. After final judgment had been entered upon the verdict for the plaintiff, the district court certified to this court the question of jurisdiction.

The record discloses the following facts in regard to the relationship existing between the plaintiff in error and the St. Louis Southwestern Railway Company and their activities in the state of New York: The St. Louis Southwestern Railway Company, a Missouri corporation, and the plaintiff in error comprise what is commonly known as the "Cotton Belt Route" running from St. Louis, Missouri, through the states of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, with nearly one-half of the mileage in Texas. A map of the two roads contained in their "Official List," showing the route of the system, makes no distinction whatsoever, between the trackage routes of the two lines.

All the stock of the plaintiff in error, save qualifying shares, is owned by the Missouri company, and the funded debt, mortgages and other obligations and assets of the plaintiff in error are owned and controlled by the Missouri company. In a certain application to the New York Stock Exchange requesting it to list securities of the Missouri company made by the secretary of that company it was stated that the proceeds were to be used for equipping and extending certain branches of the

plaintiff in error. Certain banks and trust companies in New York City act as registrars, trustees, transfer agents and agents for the two companies, the obligations being secured by mortgages upon the properties of both corporations.

The general officers and agents of one company hold similar positions with the other. The annual report of the plaintiff in error and the Missouri company are combined, and the Texas company is referred to therein as a part or division of the Missouri corporation. Throughout the report reference is made to the "entire system," and in various respects the two lines are treated as one system.

It further is shown that upon the door of an office in New York City there appears the sign "Cotton Belt Route," which words are also found on the stationery of the plaintiff in error and the Missouri company, and that beneath the symbol appears "St. Louis Southwestern Lines," and underneath the names P. H. Coombs, general eastern freight and passenger agent and C. W. Braden, traveling freight agent. In official pamphlets of the two roads the names of the plaintiff in error and the St. Louis Southwestern Railway Company are bracketed together to show that they constitute the Cotton Belt Route.

Before the action was commenced the defendant in error had considerable correspondence in regard to the claim with P. H. Coombs, of the New York office, in which the defendant in error stated that the plaintiff in error was the initial carrier and as such would be held liable for the amount of the damage. Replies were received to all such letters, acknowledging receipt and showing the attention and investigation which the claim was receiving and stating that all claims were handled by the general offices at either St. Louis or Tyler, Texas, and that the letters were being sent to the St. Louis office of the Missouri company and that it was hoped a satisfactory reply from the St. Louis office would be received at an early date. One letter was forwarded to S. C. Johnson, auditor of the Missouri company, freight claim division, and general adjuster of all freight claims of the Cotton Belt Route, who replied that he would review the matter and write fully regarding the company's position.

In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: the first, Was the corporation within the jurisdiction in which it is sued? the second, Was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case. The cause of action having accrued in New York by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. *Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Meyer*, 197 U. S. 407.

The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *The Lafayette Ins. Co. v. French*, 18 How. 404; *St. Clair v. Cox*, 106 U. S. 350; *Golden v. Morning News*, 156 U. S. 518; *Conley v. Mathieson Alkali Works*, 190 U. S. 406; *Greer v. Mathieson Alkali Works*, 190 U. S. 428; *Peterson v. Chicago, Rock Island & Pac. Ry. Co.*, 205 U. S. 364; *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437; *Herndon-Carter Co. v. Norris, Son & Co.*, 224 U. S. 496.

In the court below it was adjudged that the so-called Carmack amendment, under the circumstances here detailed, had had the effect of making the corporation liable to suit in New York and, because of the agency within New York of the connecting carrier, effected by that statute, must be held to be there present and subject to service of process. In view of the recent consideration of the Carmack amendment in this court it is unnecessary to now enter upon any extended discussion of it. The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of desti-

nation, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transportation and responsibility. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. p. 203. The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction.

We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. *Lafayette Ins. Co. v. French*, *supra*; p. 407; *Green v. Chicago, Burlington & Quincy Ry. Co.*, *supra*, p. 532. Applying the general principles which we regard as settled by this court, Was this company doing business in the state of New York in that sense?

The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the states of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the "Cotton Belt Route." This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, "Cotton Belt Route," is found in use. Underneath appears the general description, "St. Louis Southwestern Lines," and there is also named a general eastern

freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office, and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there. See in this connection, *Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Meyer*, 197 U. S. 415; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 255.

In our opinion the court did not err in holding the corporation subject to process and duly served in this case. *Judgment affirmed.*

INTERNATIONAL HARVESTER COMPANY v.
KENTUCKY.

Reported in 234 U. S. 579.
(1914.)

MR. JUSTICE DAY delivered the opinion of the court: This case presents the question of the sufficiency of the service of process on an alleged agent of the International Harvester Company in a criminal proceeding in Breckenridge county, Kentucky, in the court of which county an indictment had been returned against the Harvester Company for alleged violation of the anti-trust laws of the state of Kentucky. The Harvester Company appeared and moved to quash the return, substantially upon the ground that service had not been made upon an authorized agent of the company and that the company was not doing business within the state of Kentucky, and it set up that any action under the attempted service would

violate the due process and commerce clauses of the federal constitution. The only question involved, says the court of appeals, and we find none other in the record, is whether there was such service of process as would sustain the judgment. The court overruled the motion, and, the case being called for trial and the Harvester Company failing to appear or plead, judgment by default for \$500 penalty was entered against it, which was affirmed by the court of appeals of Kentucky (147 Kentucky, 655).

It appeared that prior to October 28, 1911, before this indictment was returned, the Harvester Company had been doing business in Kentucky and had designated Louisville, Kentucky, as its principal place of business, in compliance with the statutes of Kentucky in that respect. It further appeared that the company had revoked the agency of one who had been appointed under the Kentucky statute and had not appointed anyone else upon whom process might be served.

It is conceded in the brief of the learned counsel for the plaintiff in error, that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the Harvester Company, was a question within the province of the court of appeals of Kentucky to finally determine, and no review of that decision is asked here. We come then to the first question in this case, which is, Whether under the circumstances shown in this case the Harvester Company was carrying on business in the state of Kentucky in such manner as to justify the courts of that state in taking jurisdiction of complaints against it.

For some purposes a corporation is deemed to be a resident of the state of its creation, but when a corporation of one state goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state. The mere presence of an agent upon personal affairs does not carry the corporation into the foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be "doing business" within the state. *St. Louis S. W. Ry. v. Alexander*, 227 U. S.

218, 226, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the state.

In the case now under consideration the court of appeals of Kentucky found, with warrant for the conclusion, that the Harvester Company's method of conducting business might be shown to the best advantage from the general instruction to its agents of date November 7, 1911, as follows:

"The company's transactions hereafter with the people of Kentucky must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the state of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter can not be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the state. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the company's general agents deviates from what is stated in this letter, the result will be just the same

as if all of them had done so. Anything that is done that places the company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the company liable for doing business in the state without complying with the requirements of the laws of the state. We will, therefore, depend upon you to see that these instructions are strictly carried out."

Taking this as the method of carrying on the affairs of the Harvester Company in Kentucky, does it show a doing of business within that state to the extent which will authorize the service of process upon its agents thus engaged?

Upon this question the case is a close one, but upon the whole we agree with the conclusion reached by the court of appeals, that the Harvester Company was engaged in carrying on business in Kentucky and had withdrawn from that state for reasons of its own. Its motives can not affect the legal questions here involved. In order to hold it responsible under the process of the state court it must appear that it was carrying on business within the state at the time of the attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state.

It is argued that this conclusion is in direct conflict with the case of *Green v. Chicago, Burlington & Quincy R.*, 205 U. S. 530. We have no desire to depart from that decision, which,

however, was an extreme case. There the Railway Company, carrying on no business in Pennsylvania, other than that hereinafter mentioned, and having its organization and tracks in another state, was sought to be held liable in the circuit court of the United States for the eastern district of Pennsylvania by service upon one Heller, who was described as an agent of the corporation. As incidental and collateral to its business proper the company solicited freight and passenger traffic in other parts of the country than those through which its tracks ran. For that purpose it employed Heller, who had an office in Philadelphia, where he was known as district freight and passenger agent, to procure passengers and freight to be transported over the company's line. He had clerks and traveling passenger and freight agents who reported to him. He sold no tickets and received no payment for the transportation of freight, but took the money of those desiring to purchase tickets and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order which gave the holder the right to receive from the company in Chicago a ticket over its road. Occasionally he sold to railroad employees, orders for reduced rates over the company's line. In some cases for the convenience of shippers who had received bills of lading from the initial line for goods routed over the company's line, he exchanged bills of lading over its line, which were not in force until the freight had been actually received by the company. Summarizing these facts, Mr. Justice Moody, speaking for the court, said (p. 533): "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky.

It is further contended that as enforced by the decision of the Kentucky court the law, in its relation to interstate commerce, operates to burden that commerce. It is argued that a corporation engaged in purely interstate commerce within a state can not be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement can not be made the ordinary agents of the corporation, although doing interstate business within the state, can not by its laws be made amenable to judicial process within the state. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the state in which it is carrying on such business. This is, indeed, as was said by the court of appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention.

True, it has been held time and again that a state can not burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state. In *Davis v. Cleveland, C., C. & St. L. Ry.*, 217 U. S. 157, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the state regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the states may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the constitution gives sole jurisdiction to congress, citing *Sherlock v. Alling*, 93 U. S. 99, 103; *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388; *Kidd v. Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; and *The Winnebago*, 205 U. S. 354, 362, in which this court sustained a lien under the laws

of Michigan on a vessel designed to be used in both foreign and domestic trade.

In *International Textbook Co. v. Pigg*, 217 U. S. 91, it was held that a law of Kansas which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition as a prerequisite of the right to do such business and which required a certificate from the secretary of state showing that such statements had been filed as a condition precedent to the right of the corporation to maintain a suit in that state, was void. But that case did not hold, as we should be required to do to sustain the contention of the plaintiff in error in this case, that the fact that the corporation was carrying on interstate commerce business through duly authorized agents made it exempt from suit within the state by service upon such agents.

We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state.

It follows that the judgment of the court of appeals of Kentucky must be *affirmed*.

In *Shaw v. Quincy*, 145 U. S. 444, it was held that a corporation created in one state and having a usual place of business in another state can not be sued in the latter state by a citizen of a third state.

(bb) Other organizations.

However, for jurisdictional purposes, citizenship is not ascribed to artificial persons other than corporations. Concerning (a) partnership, see *Great Southern Hotel Co. v. Jones*, 177 U. S. 449; (b) board of trustees, see *Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 207; (c) joint stock company, *Saunders v. Adams Express Co.*, 136 Fed. R. 494, and *Chapman v. Barney*, 129 U. S. 671 (involving United States Express Company).

(c) Venue.

(aa) In general, and waiver.**SMITH v. LYON.**

Reported in 133 U. S. 315.
(1890.)

MR. JUSTICE MILLER delivered the opinion of the court: This is a writ of error to the circuit court for the eastern district of Missouri. It was dismissed in that court for want of jurisdiction, and judgment rendered accordingly; to which this writ of error is prosecuted. 38 Fed. Rep. 53.

The facts out of which the controversy arises are found in the first few lines of plaintiffs' petition. In this they allege that they are partners doing business under the firm name of C. H. Smith & Co.; that the said C. H. Smith is a resident and citizen of St. Louis, in the state of Missouri, and Benjamin Fordyce is a resident and citizen of Hot Springs, in the state of Arkansas; and that the defendant O. T. Lyon is a resident and citizen of Sherman, in the state of Texas.

To this petition, which set out a cause of action otherwise sufficient, the defendant Lyon, who was served with the summons in the eastern district of Missouri, filed a plea to the jurisdiction of the court, appearing by attorney especially for that purpose, the ground of which is, that one of the plaintiffs, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the state of Arkansas, and the defendant was a resident and citizen of Sherman, in the state of Texas, and that the suit was not brought in the district of the residence of either the plaintiff Fordyce, or of the defendant.

The motion to dismiss for want of jurisdiction was sustained by the circuit court, and the soundness of that decision is the question which we are called upon to decide.

The decision of it depends upon the proper construction of the first section of the Act of Congress approved March 3, 1887, 24 Stat. 552, c. 373, as amended by the Act of August 13, 1888, 25 Stat. 433, c. 866. That statute professes to be an act to amend the Act of March 3, 1875, and its object is "to determine

the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes.''' The first section of the act confers upon the circuit courts of the United States original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of \$2,000, and arising under the constitution or laws of the United States or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different states, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the statute. This first clause of the act describes the jurisdiction common to all the circuit courts of the United States, as regards the subject-matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in circuit courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits, and this clause declares "that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the case before us, one of the plaintiffs is a citizen of the state where the suit is brought, namely, the state of Missouri, and the defendant is a citizen of the state of Texas. But one of the plaintiffs is a citizen of the state of Arkansas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The

argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a state of which either of them is a citizen.

It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute, introduced for the first time, would be one of very considerable doubt. But there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit can not be sustained.

The original Judiciary Act of 1789, which established the courts of the United States and defined their jurisdiction, declared in reference to the circuit courts, in Section 11 of that act, 1 Stat. 78, that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." The construction of this phrase, "where the suit is between a citizen of the state where the suit is brought and a citizen of another state," came before the supreme court at an early day in the case of *Strawbridge v. Curtiss*, 3 Cranch, 267; and Chief Justice Marshall delivered the opinion of the court, which was without dissent, in the following language:

"The court understands these expressions" (referring to the words "suit between a citizen of the state where the suit is brought and a citizen of another state") "to mean that each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the federal courts. That is, that where the interest is joint each of the persons concerned

in that interest must be competent to sue, or liable to be sued, in the courts of the United States.”

This construction has been adhered to from that day to this, and, although the statutes have modified the jurisdiction of the court as regards the amount in controversy and in many other particulars, the language construed by the court in *Strawbridge v. Curtiss* has been found in all of them. This statute, conferring and defining the jurisdiction of circuit courts of the United States, has been re-enacted and recast several times since the original decision of *Strawbridge v. Curtiss*. The first of these was the general revision of the statutes of the United States, passed in 1874, in which the language of the statute of 1789 is supposed to be reproduced accurately. But an Act of March 3, 1875, 18 Stat. 470, c. 137, undertook to recast the jurisdiction of the circuit courts, and its first section, the important one in this connection, contains the same language in regard to the jurisdiction of the court in controversies between citizens of different states, and also the provision that no civil suit shall be brought in either of said courts by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving process. The statute remained in this condition until the Act of 1887, which we are now considering, as amended by the Act of August 13, 1888, 25 Stat. 433.

During this period, and since the case of *Strawbridge v. Curtiss*, this jurisdictional clause has been frequently construed by this court, and that case has been followed. In the case of *New Orleans v. Winter*, 1 Wheat. 91, the same question arose, and was decided in the same way. In the case of *Coal Company v. Blatchford*, 11 Wall. 172, Mr. Justice Field, referring to these decisions, states the effect of them in the following language:

“In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction can not be entertained.”

The question was very fully considered in the case of the *Sewing Machine Companies*, 18 Wall. 553, where the same proposition is stated in almost identical language. And in the

case of *Peninsular Iron Company v. Stone*, 121 U. S. 631; the chief justice reviews all these cases and reaffirms the doctrine as applicable to cases arising under the Act of 1875.

The statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the circuit court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new statute, show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the circuit courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides.

We do not think, in the light of this long-continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of *Strawbridge v. Curtiss*, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject-matter. It is not readily to be conceived that the congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court.

These considerations require the affirmance of the judgment of the circuit court, and it is so ordered.

IN RE KEASBEY AND MATTISON COMPANY.

Reported in 160 U. S. 221.

(1895.)

THIS was a petition for a writ of mandamus to the judges of the circuit court of the United States for the southern district

of New York, to command them to take jurisdiction and proceed against the E. L. Patch Company upon a bill in equity, filed in that court on January 26, 1895, by the petitioner, described in the bill as a corporation organized and existing under the laws of the state of Pennsylvania, against the E. L. Patch Company, alleged in the bill to be a corporation organized and existing under the laws of the state of Massachusetts, and having its principal office and place of business in the city and state of New York, and against Henry E. C. Kuehne and Edward H. Lubbers, alleged to be citizens of the United States and of the state of New York, and managing or general agents of the E. L. Patch Company in that state, for infringement of a trademark, owned by the petitioner, registered in the patent office under the laws of the United States, and used in commerce between the United States and several foreign nations named in the bill; and alleging that "this is a suit of a civil nature in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the laws of the United States, and also in which there is a controversy between citizens of different states, within the intent and meaning of the statute in such case made and provided."

Upon the filing of the bill in equity, a subpoena addressed to all the defendants was issued, and was served in the city of New York upon the E. L. Patch Company by exhibiting the original and delivering a copy to Kuehne, one of its managing agents in the district, and was also served upon Kuehne and Lubbers individually.

Upon the return of the subpoena, the E. L. Patch Company, by its solicitor appearing specially for this purpose, moved to set aside the alleged service of the subpoena upon the company; and the circuit court, upon a hearing, ordered that the motion be granted, and that service set aside as null and void, and the company relieved from appearing to plead or answer to the bill.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court: This case presents a single question of jurisdiction of the circuit court of the United States, and involves no consideration of the merits of the cause of action asserted in the bill filed in that court. * * *

But when this suit was brought, the first section of the Judiciary Act of 1875 had been amended by the Act of March 3, 1887, c. 373, as corrected by the Act of August 13, 1888, c. 866, in the parts above quoted, by substituting, for the jurisdictional amount of \$500, exclusive of costs, the amount of \$2,000, exclusive of interest and costs; and by striking out, after the clause "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," the alternative, "or in which he shall be found at the time of serving such process, or commencing such proceeding," and by adding "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 433.

The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation can not be considered a citizen, an inhabitant or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union can not be compelled to answer to a civil suit, at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state. *McCormick Co. v. Walthers*, 134 U. S. 41, 43; *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co. v. Denton*, 146 U. S. 202. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But

the reasoning on which they proceeded is equally applicable in the other class, mentioned in the same section, of suits arising under the constitution, laws or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and can not, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

When the parties are citizens of different states, so that the case comes within the general grant of jurisdiction in the first part of the section, the defendant, by entering a general appearance in a suit brought against him in a district of which he is not an inhabitant, waives the right to object that it is brought in the wrong district. *Interior Construction Co. v. Gibney*, ante, 217, and cases there cited. But a corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district. *Shaw v. Quincy Mining Co.* and *Southern Pacific Co. v. Denton*, above cited.

In the case of Hohorst, petitioner, 150 U. S. 653, on which the petitioner in this case principally relied, the decision was that the provision of the Act of 1888, forbidding suits to be brought in any other district than that of which the defendant is an inhabitant, had no application to an alien or a foreign corporation sued here, and especially in a suit for infringement of a patent right; and therefore such a firm or corporation might be so sued by a citizen of a state of the Union in any district in which valid service could be made on the defendant. That case is distinguishable from the one now before the court in two essential particulars: First. It was a suit against a foreign corporation, which, like an alien, is not a citizen or an inhabitant of any district within the United States; and was therefore not within the scope or intent of the provision requiring suit to be brought in the district of which the defendant is an inhabitant. See *Galveston etc. Railway v. Gonzales*, 151 U. S. 496. Second. It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit

courts of the United States by Section 629, Cl. 9, and Section 711, Cl. 5, of the Revised Statutes, re-enacting earlier acts of congress; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several states.

In *United States v. Mooney*, 116 U. S. 104, it was likewise held that the first section of the Judiciary Act of 1875 did not take away the exclusive jurisdiction, conferred by earlier statutes upon the district courts of the United States, over suits for the recovery of penalties and forfeitures under the customs laws of the United States.

No such rule is applicable to a suit for infringement of a trademark under the Act of 1881. That act, while conferring upon the courts of the United States, in general terms, jurisdiction over such suits, without regard to the amount in controversy, does not specify either the court of the district of the United States in which such suits shall be brought, nor does it assume to take away or impair the jurisdiction which the courts of the several states always had over suits for infringement of trademarks.

This suit, then, assuming it to be maintainable under the Act of 1881, is one of which the courts of the United States have jurisdiction concurrently with the courts of the several states. The only existing act of congress, which enables it to be brought in the circuit court of the United States, is the Act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States, and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant can not be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the circuit court.

Whether the provision in Section 7 of the Trademark Act of 1881, that the courts of the United States should have original jurisdiction in such cases, without regard to the amount in controversy, would control the pecuniary limit of jurisdiction in the subsequent Act of 1888, as in the prior Act of 1875, of which

that act was an amendment, it is unnecessary to consider, because this bill distinctly alleges that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. *Writ of mandamus denied.*

WESTERN LOAN AND SAVINGS COMPANY
v.
BUTTE AND BOSTON CONSOLIDATED MINING
COMPANY.

Reported in 210 U. S. 368.

(1908.)

MR. JUSTICE DAY delivered the opinion of the court: The plaintiff in error brought this action at law against the defendant in error in the circuit court for the district of Montana. Jurisdiction was based solely on the diversity of citizenship of the parties. The plaintiff was a citizen of Utah and the defendant a citizen of New York. The judge of the circuit court dismissed the action for want of jurisdiction, and whether that decision was correct is the single question brought directly here by writ of error. The circuit court for the district of Montana was without jurisdiction of the action, because neither of the parties to it was a resident of that district, and the statute (25 Stat. 433) requires that where the jurisdiction is founded on the fact that the parties are citizens of different states, suit shall be brought only in the district where one of them resides. But we have recently held that where diversity of citizenship exists, as it does here, so that the suit is cognizable in some circuit court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490. Anything to the contrary said in *Ex parte Wisner*, 203 U. S. 449, was overruled. The question here, therefore, is narrowed to the inquiry, whether the defendant waived the objection to the jurisdiction?

While the conformity act, Revised Statutes Section 914, provides that the practice, pleadings, forms and modes of proceeding in civil causes, other than those in equity and admiralty, in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings and forms, and

modes of proceeding existing at the time in like causes in courts of record of the state wherein such United States courts are held, nevertheless, in cases like the one under consideration, involving the jurisdiction of the federal courts, the ultimate determination of such question is for this court alone. This doctrine finds illustration in the case of *Mexican Central Railway Co. v. Pinkney*, 149 U. S. 194, in which the subject is discussed by Mr. Justice Jackson, delivering the opinion of the court. In that case it was held that the Texas statute, which had been upheld by the courts of the state, giving to a special appearance, made solely to challenge the court's jurisdiction, the effect of a general appearance, was not binding upon the federal courts sitting in the state, notwithstanding the provisions of Section 914 of the Revised Statutes of the United States.

In the case at bar, defendant filed its demurrer to the complaint alleging: 1st, that the court has no jurisdiction of the subject of the action; 2d, that the court has no jurisdiction of the person of the defendant; 3d, that said complaint does not state facts sufficient to constitute a cause of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible.

The learned judge on the seventh of November, 1903, overruled the demurrer as to the first, second and third grounds of the complaint, but sustained it upon the fourth and fifth grounds, in that the complaint was uncertain and unintelligible. Thereupon the plaintiff filed an amended complaint; the defendant repeated the same grounds of demurrer, and the same was submitted to the court on the first and second grounds, those covering jurisdiction over the subject-matter of the action and jurisdiction over the person of the defendant, respectively, and on the twenty-sixth of October, 1906, Judge Hunt, holding the circuit court for the district of Montana, in a well-considered opinion held that inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana

district and had submitted to the jurisdiction. In support of his view Judge Hunt cited *Interior Construction & Improvement Company v. Gibney*, 160 U. S. 217; *In re Keasbey & Mattison Company*, 160 U. S. 221; *Ex parte Schollenberger*, 96 U. S. 369; *Central Trust Company v. McGeorge*, 151 U. S. 129; *St. Louis etc. R. R. Co. v. McBride*, 141 U. S. 127; *Lowry v. Tile*, 98 Fed. Rep. 817; *Texas & Pacific Railway v. Saunders*, 151 U. S. 105. Thereafter, before any further steps were taken in the case, the learned judge changed his ruling on the question of jurisdiction, and filed the following brief memorandum opinion:

"As neither party to this action was, at the time of the institution thereof, a citizen or resident of the state of Montana, upon the authority of *Ex parte Abram C. Wisner*, decided by the supreme court December 10, 1906, and followed by the court of appeals of this circuit in *Yellow Aster Mining Company and Southern Pacific Company v. R. M. Burch*, decided February 11, 1907, I must reverse the ruling heretofore made by me upon the demurrer, and dismiss the case for lack of jurisdiction.

"So ordered."

Let us see, then, whether the defendant had submitted to the jurisdiction of the circuit court. It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits so far as the legal sufficiency of the cause of action is concerned. Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling is subsequently changed on the authority of *Ex parte Wisner*, which is now overruled in *In re Moore*, in so far as it was said in the Wisner case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed.

So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to Section 1820 of the Montana code, making a special appearance by motion aimed

at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of congress. This course was open to the defendant in the United States circuit court, as is shown by the case of *Shaw v. Quincy Mining Co.*, 145 U. S. 444, a suit in a district in the state of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of states other than New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in *In re Keasbey & Mattison Co., Petitioners*, 160 U. S. 221.

In *St. Louis & San Francisco R. R. Co. v. McBride*, 141 U. S. 127, the case, like the present one, arose in a code state. Suit was brought in the circuit court of the United States for the western district of Arkansas. The Arkansas code in respect to grounds of demurrer is identical with the Montana code. Kirby's Digest of the Statutes of Arkansas, 1904, p. 1285. Following the Arkansas code, as the defendant in this case follows the Montana code, the defendant filed a demurrer in language identical upon these points with the demurrer in this case. The demurrer reads: "1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court has no jurisdiction of the subject-matter of the action. 3d. Because the complaint does not state facts sufficient to constitute a cause of action."

Of the effect of this demurrer Mr. Justice Brewer, delivering the opinion of the court, said:

"Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and by filing the demurrer on the grounds stated submitted to the jurisdiction of the circuit court. *Judgment reversed.*

SHAW v. QUINCY.

Reported in 145 U. S. 444.

(1892.)

THIS was a petition for a writ of mandamus to the judges of the circuit court of the United States for the southern district of New York to command them to take jurisdiction against the Quincy Mining Company upon a bill in equity, filed in that court on September 3, 1891, by the petitioner, described in the bill as a citizen of Massachusetts, in behalf of himself and other stockholders of the Quincy Mining Company, against "the Quincy Mining Company, a corporation duly organized under the laws of the state of Michigan, and having a usual place of business in the city, county and state of New York," and against certain individuals described in the bill as citizens of the state of New York. Upon that bill a subpoena was issued, directed to the Quincy Mining Company, and, as appeared by the marshal's return thereon, was served upon it within the southern district of New York by exhibiting to its secretary the original subpoena and leaving with him a copy. The Quincy Mining Company appeared specially, and moved for an order to set aside the service.

At the hearing of the motion, it appeared that the Quincy Mining Company was a corporation organized for the purpose of mining in the county of Houghton in the Upper Peninsula of the state of Michigan, under the statute of Michigan of May 11, 1877, c. 113, by Section 30 of which "it shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this state, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for, but every such company having its business office out of this state shall have an office for the transaction of business within this state, to be also designated in such articles

of association;” and that this company, in its articles of association, did provide as follows: “The business office of the company hereby constituted and formed shall be in the city, county and state of New York, and another business office is hereby established at the Quincy mine, in the county of Houghton and state of Michigan.”

The order to set aside the service was granted by the court, upon the ground (as stated in its return to the rule to show cause why the writ of mandamus should not issue) “that said Quincy Mining Company is a corporation created and existing under the laws of the state of Michigan, and is an inhabitant of the western district of Michigan, and not an inhabitant of the southern district of New York.”

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court: The single question of this case is whether under the Act of March 3, 1887, c. 373, Section 1, as corrected by the Act of August 13, 1888, c. 866 (the material parts of which are copied in the margin) a corporation incorporated in one state of the Union, and having a usual place of business in another state in which it has not been incorporated, may be sued, in a circuit court of the United States held in the latter state, by a citizen of a different state.

This question, upon which there has been a diversity of opinion in the circuit courts, can be best determined by a review of the acts of congress, and of the decisions of this court, regarding the original jurisdiction of the circuit court of the United States over suits between citizens of different states.

In carrying out the provision of the constitution which declares that the judicial power of the United States shall extend to controversies “between citizens of different states,” congress, by the Judiciary Act of September 24, 1789, c. 20, Section 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, “between a citizen of the state where the suit is brought and citizen of another state,” and provided that “no civil suit shall be brought” “against an inhabitant of the United States,” “in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.” 1 Stat. 78, 79.

The word "inhabitant," in that act, was apparently used, not in any larger meaning than "citizen" but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state, like the district of Maine and Massachusetts in the state of Massachusetts, and the districts of Virginia and Kentucky in the state of Virginia, established by Section 2 of the same act, 1 Stat. 73. It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the state, which was the fact on which the jurisdiction depended under the provisions of the constitution and of the Judiciary Act. *Bingham v. Cabot*, 3 Dall. 382; *Turner v. Bank of North America*, 4 Dall. 8; *Abercrombie v. Dumuis*, 1 Cranch. 343; *Hodgson v. Bowerbank*, 5 Cranch. 303; *Brown v. Keene*, 8 Pet. 112, 115. The same rule has been maintained to the present day, and has been held to be unaffected by the fourteenth amendment of the constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." *Robertson v. Cease*, 97 U. S. 646; *Grace v. American Ins. Co.*, 109 U. S. 278; *Timmons v. Elyton Land Co.*, 139 U. S. 378; *Denny v. Pironi*, 141 U. S. 121.

By the Act of May 4, 1858, c. 27. Section 1, it was enacted that, in a state containing more than one district, actions not local should "be brought in the district in which the defendant resides," or "if there be two or more defendants residing in different districts in the same state," then in either district. 11 Stat. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a state containing two or more districts: and directed suits against citizens of such a state to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued

out of the state of which they were citizens, but simply prescribed in which district of that state they might be sued.

These provisions of the Acts of 1789 and 1858 were substantially re-enacted in Sections 739 and 740 of the Revised Statutes.

The Act of March 3, 1875, c. 137, Section 1, after giving the circuit courts jurisdiction of suits "in which there shall be a controversy between citizens of different states," and enlarging their jurisdiction in other respects, substantially re-enacted the corresponding provision of the Act of 1789, by providing that no civil suit should be brought "against any person" "in any other district than that whereof he is an inhabitant or in which he shall be 'found' at the time of service," with certain exceptions not affecting the matter now under consideration. 18 Stat. 470.

The Act of 1887, both in its original forms, and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that "where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Co. v. Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320;

In re Pennsylvania Co., 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467.

As to natural persons, therefore, it can not be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase "district of the residence of" a person is equivalent to "district whereof he is an inhabitant," and can not be construed as giving jurisdiction by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen.

In *Bank of Augusta v. Earle*, 13 Pet. 519, 588, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is not longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another."

This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by

which it was created, although it may do business in other states whose laws permit it.

In *Lafayette Ins. Co. v. French*, 18 How. 404, in which an Indiana corporation was sued in Indiana upon a judgment recovered in an action against it in a state court of Ohio upon a contract made in that state, this court, speaking by Mr. Justice Curtis, and referring to *Bank of Augusta v. Earle*, said: "This corporation, existing only by virtue of a law of Indiana, can not be deemed to pass personally beyond the limits of that state," and held that it was bound by the judgment, because it had been allowed by the state of Ohio to make contracts in that state only upon the reasonable and lawful condition of its agent, residing and making contracts there, being deemed its agent to receive service of process in suits upon such contracts; and therefore that such a judgment recovered after such a notice was "as valid as if the corporation had had its habitat within the state." 18 How. 407, 408.

"A corporation," said Chief Justice Waite, "created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state." "By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad." *Railroad Co. v. Koontz*, 104 U. S. 11, 12. See, also, *Paul v. Virginia*, 8 Wall. 168, 181; *Railroad Co. v. Harris*, 12 Wall. 65, 81; *St. Clair v. Cox*, 106 U. S. 350, 354, 356; *Canada Southern Railway v. Gebhard*, 109 U. S. 527, 537.

The same doctrine has been constantly maintained by this court in applying to corporations the judiciary acts conferring on the circuit courts of the United States jurisdiction of suits between citizens of different states.

Those acts have never named corporations; and for half a century after the passage of the first act corporations were allowed to sue and be sued in the circuit court, only when all the members of the corporation were, and were alleged to be, citizens of the state which created the corporation. *Bank of United States v. Deveaux*, 5 Cranch, 61; *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat.

450; *Breithaupt v. Bank of Georgia*, 1 Pet. 238; *Commercial Bank v. Slocomb*, 14 Pet. 60.

But in *Louisville, etc., Railroad v. Letson*, in 1844, it was adjudged, upon great consideration, that it is sufficient to sustain the jurisdiction that the corporation is created by a different state from that of which the opposite party is a citizen; and Mr. Justice Wayne stated that the court rested its judgment upon the ground "that a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person," and "is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for the purposes of suing and being sued." 2 How. 497, 558. And it has ever since been treated as settled that, for these purposes, the members of the corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled. *Marshall v. Baltimore & Ohio Railroad Company*, 16 How. 314, 328; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233; *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286, 296; *Muller v. Dows*, 94 U. S. 444; *Steamship Co. v. Tugman*, 106 U. S. 118, 121; *Memphis & Charleston Railroad v. Alabama*, 107 U. S. 581, 585.

In *Insurance Co. v. Francis*, it was held that the Act of March 2, 1867, c. 196 (14 Stat. 558; Rev. Stat., Section 639, Cl. 3), authorizing the removal into the courts of the United States of suits "between a citizen of the state in which the suit is brought and a citizen of another state," did not warrant the removal of an action brought in a court of the state of Mississippi, in which the plaintiff, a citizen of Illinois, alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws; and Mr. Justice Davis, in delivering judgment, said: "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Un-

like a natural person, it can not change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it can not, on that account, acquire a residence there." 11 Wall. 210, 216.

In *Ex parte Schollenberger*, 96 U. S. 369, 377, Chief Justice Waite said: "A corporation can not change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws." The jurisdiction of the circuit court in that case, as well as in *New England Ins. Co. v. Woodworth*, 111 U. S. 138, 146, was maintained upon the ground that the defendant corporation, though incorporated in another state, yet, by reason of doing business in the state in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that state, within the meaning of the Act of March 3, 1875, c. 137, Section 1, then in force, and hereinbefore cited.

The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or the defendant." In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons who were not contemplated, than as to natural persons who were. If, as it is more reasonable to suppose, congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a state in which it had not been incorporated.

The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York, by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in the wrong district. *Gracie v. Palmer*, 8 Wheat. 699; *St. Louis & San Francisco Railway v. McBride*, 141 U. S. 127, 131, and cases cited.

This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. Nor does it affect cases in admiralty, for those have been adjudged not to be within the scope of the statute. *In re Louisville Underwriters*, 134 U. S. 488.

All that is now decided is that, under the existing act of congress a corporation, incorporated in one state only, can not be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state. *Writ of mandamus denied*.

Mr. Justice Harlan dissented.

See Sections 51 to 57 of the Judicial Code of 1911.

Where plaintiffs, citizens of one state, sue defendant corporations which are citizens of other states, in a United States court in plaintiffs' state, on a charge of violation of a federal statute, the court can not take jurisdiction without waiver by defendants. *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501.

On the necessity of observing the distinction between jurisdictional and venue provisions of the federal statutes, see the exhaustive opinions of Cochran, J., in *Kentucky Coal Lands Co. v. Mineral Development Co.*, 191 Fed. Rep. 899, and *L. & N. R. Co. v. W. U. Tel. Co.*, 218 Fed. Rep. 91.

(bb) By attachment of property under state statutes.

TOLAND v. SPRAGUE.

Reported in 12 Peters, 300.

(1838.)

BARBOUR, Justice, delivered the opinion of the court: This is a writ of error to a judgment of the circuit court of the

United States for the district of Pennsylvania. The suit was commenced by the plaintiff in error, against the defendant in error, by a process known in Pennsylvania by the name of a foreign attachment; by which, according to the laws of that state, a debtor who is not an inhabitant of the commonwealth, is liable to be attached by his property found therein, to appear and answer a suit brought against him by a creditor. It appears upon the record, that the plaintiff is a citizen of Pennsylvania; and the defendant, a citizen of Massachusetts, but domiciled, at the time of the institution of the suit, and for some years before, without the limits of the United States, to wit, at Gibraltar; and when the attachment was levied upon his property, not being found within the district of Pennsylvania. Upon the return of the attachment, executed on certain garnishees holding property of, or being indebted to, the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court; after which, the defendant appeared and pleaded. Issues were made up between the parties, on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial, a bill of exceptions was taken by the plaintiff, stating the evidence at large, and the charge given by the court to the jury; which will hereafter be particularly noticed, when we come to consider the merits of the case. But before we do so, there are some preliminary questions arising in the case, which it is proper for us to dispose of.

And the first is, whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him? The answer to this question must be found in the construction of the eleventh section of the Judiciary Act of 1789, as influenced by the true principles of interpretation; and by the course of legislation on the subject. That section, so far as relates to this question, gives to the circuit courts original cognizance, concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive

of costs, the sum or value of five hundred dollars, and an alien is a party; or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. It then provides, that no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and moreover, that no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he will be found at the time of serving the writ. As it respects persons who are inhabitants, or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is, in giving a construction to the section in relation to those who are not inhabitant, and not found in the district.

This question was elaborately argued by the circuit court of Massachusetts, in the case of *Picquet v. Swan*, reported in 5 Mason, 35. Referring to the reasoning in that case, generally, as having great force, we shall content ourselves with stating the substance of it, in a condensed form, in which we concur. Although the Process Acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect, where they contravene the legislation of congress. The state laws can confer no authority on this court, in the exercise of its jurisdiction, by the use of state process, to reach either persons or property, which it could not reach within the meaning of the law creating it. The Judiciary Act has divided the United States into judicial districts; within these districts, a circuit court is required to be holden; the circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union; it has not done so. It has not, in terms, authorized any original civil process to run into any other district; with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can

now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other, in favor of the United States, in any part of the United States. We think, that the opinion of the legislature is thus manifested to be, that the process of a circuit court can not be served without the district in which it is established, without the special authority of law therefor.

If such be the inference from the course of legislation, the same interpretation is alike sustained by considerations of reason and justice. Nothing can be more unjust, than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him, by which he will have notice, which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan v. Rucker*, 9 East 192. Now, it is not even contended, that the circuit courts could proceed to judgment against a person who was domiciled without the United States, and not found within the judicial district, so as to be served with process, where the party had no property within such district. We would ask what difference there is, in reason, between the cases in which he *has*, and *has not* such property? In the one case as in the other, the court renders judgment against a person, who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction, and upon whom they have no power to cause process to be personally served. If there be such a difference, we are unable to perceive it.

In examining the two restraining clauses of the eleventh section, we find, that the process of *capias* is, in terms, limited to the district in which it is issued. Then follows the clause which declares, that no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. We think that the true construction of this clause is, that it did not mean to distinguish between those who are inhabitants of, or found within the district, and per-

sons domiciled abroad, so as to protect the first, and leave the others not within the protection; but that even in regard to those who were within the United States, they should not be liable to the process of the circuit courts, unless in one or the other predicament stated in the clause; and that as to all those who were not within the United States, it was not in the contemplation of congress, that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; and therefore, there was no provision whatsoever made in relation to them.¹

If, indeed, it be assumed, that congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction, then the restrictions might be construed as operating only in favor of the inhabitants of the United States, in contradistinction to those who were not inhabitants; but, upon the principle which we have stated, that congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive, why the restriction in regard to the process was confined to inhabitants of the United States. Plainly, because it would not have been necessary or proper, to apply the restriction to those whom the legislature did not contemplate, as being within the reach of the process of the courts, either with or without restrictions.

With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, viz.: 1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation, the process can only be served upon persons within the same districts. 3d. That the acts of congress adopting the state process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4th. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court *in personam*; that is, where they are inhabitants, or found within the United

States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here: and we add, that even in case of a person being amenable to process *in personam*, an attachment against his property can not be issued against him; except as part of, or together with, process to be served upon his person.

¹ Court divides on this question, four justices regarding the holding unnecessary in this case.

CHAFFEE v. HAYWARD.

Reported in 20 Howard, 208.

(1857.)

MR. JUSTICE CATRON delivered the opinion of the court: The question of law decided below, and which we are called on to revise, arises on the following facts: On the twenty-second day of October, 1855, the plaintiff in error sued out a writ in the circuit court of the United States for the Rhode Island district, against Nathaniel Hayward, styling him as "of Colchester, in the state of Connecticut, commorant of Providence, in the state of Rhode Island," for the recovery of damages alleged to have been sustained by the plaintiff in error, by reason of an alleged infringement of a patent right claimed by said plaintiff.

On the same day, the marshal of the Rhode Island district made return on the writ, that "for want of the body of the within defendant to be by me found within my district, I have attached, etc. (enumerating certain real estate lying in the city of Providence, in the state of Rhode Island), and a still further return of having made further service of the writ, by attaching all the personal estate of the defendant in the India rubber factory of Hartshorn & Co., and in the store or warehouse No. 7, Dorrance street stores, etc., and "have left true and attested copies of this writ, with my doings thereon, with the city clerk of the city of Providence, and with John Sweet and William E. Himes, they being in possession of the premises, the defendant having no known place of abode within my district."

At the November term of the court, a declaration was filed, containing the allegations of citizenship of the plaintiff and

defendant, and that the defendant was commorant of Providence, as in the writ; and at the same term the defendant, in his own proper person, pleaded to the jurisdiction of the court, that he was at the time of the pretended service of the writ, and is, an inhabitant of the district of Connecticut, and not an inhabitant of the district of Rhode Island, nor was he at the time of the pretended service of the writ within the district of Rhode Island; praying the judgment of the court, whether it can or will take cognizance of the action against him.

To this plea the plaintiff, by his attorney, filed a general demurrer, on which the cause was heard, and at the June term the court overruled the demurrer and dismissed the case for want of jurisdiction; upon which, the plaintiff sued out a writ of error.

By the eleventh section of the Judiciary Act of 1789, it is provided, "That no civil suit in a circuit or district court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

It has been several times held by this court as the true construction of the foregoing section, that jurisdiction of the person of a defendant (who is an inhabitant of another state) can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a nonresident defendant, pursuant to a state attachment law. The doctrine announced to this effect, in the case of *Toland v. Sprague*, in 1838 (12 Peters, 327), has been uniformly followed since, both by this court and at the circuits. (15 Pet. 171; 17 How. 424.)

It is insisted, however, for the plaintiff, that these rulings were had in cases arising where the jurisdiction depended on citizenship; whereas, here the suit is founded on an act of congress conferring jurisdiction on the circuit courts of the United States in suits by inventors against those who infringe their letters patent, including all cases, both at law and in equity, arising under the patent laws, without regard to citi-

zenship of the parties or the amount in controversy, and therefore the eleventh section of the Judiciary Act does not apply, but the Process Acts of the state where the suit is brought must govern; and that the Act of Congress of May 8, 1792, so declares.

The second section of that act provides, that the forms and modes of proceeding in suits at common law shall be the same as are now used in the federal courts, respectively, pursuant to the Act of 1789, ch. 21, known as the Process Act of that year.

This act (Section 2) declares, that until further provision shall be made, and except where by this act "or other statutes of the United States is otherwise provided," the forms of writs and executions, and modes of process in suits at common law, shall be the same in each state, respectively, as are now used or allowed in the supreme court of the same. This was to be the mode of process, unless provision had been made by congress; and, to the extent that congress had provided, the state laws should not operate.

Now, the only statute of the United States then existing regulating practice, was the Judiciary Act of 1789 (Chapter 20), which is above recited. The eleventh section is excepted out of and stands unaffected by the subsequent Process Acts, and is as applicable in this case as it was to those where jurisdiction depended on citizenship. It applies in its terms to all civil suits; it makes no exception, nor can the courts of justice make any.

The judicial power extends to all cases in law and equity arising under the constitution and laws of the United States, and it is pursuant to this clause of the constitution that the United States courts are vested with power to execute the laws respecting inventors and patented inventions; but, where suits are to be brought is left to the general law: to wit, to the eleventh section of the Judiciary Act, which requires personal service of process, within the district where the suit is brought, if the defendant be an inhabitant of another state.

This case, and that of Day against Hayward, depend on the same grounds of jurisdiction, and were both correctly

decided in the circuit court; and the judgment in each is affirmed.

In *Pennoyer v. Neff*, 95 U. S. 714, there was a judgment *in personam* against Neff, a nonresident, in state court of Oregon, on service by publication, making the required affidavit as to nonresidence and ownership of property in the county. Under the judgment realty of Neff was taken and sold to Pennoyer. Subsequently Neff brought this suit against Pennoyer in United States circuit court to recover the land sold. *Held*, personal judgment is without validity; title did not pass. Court recognizes right of state to attach property and apply it to any obligation found due from defendant, *i. e.*, where the action is to subject the property to the debt of defendant, and hence proceeding is in nature of action *in rem*.

In *Ex parte Railway Company*, 103 U. S. 794, an Iowa corporation sued citizen of Massachusetts in United States circuit court for Iowa, and asked for attachment on defendant's property in Iowa, which was issued without personal service. Motion made for service by publication. Defendant appeared at hearing on motion to question jurisdiction and court ordered dismissal, and dissolved attachment. Writ of mandamus asked in supreme court of the United States, requiring circuit court of the United States to set aside the orders mentioned, restore the case to its original status, and proceed therein. Mandamus refused, as it is taking the place of writ of error. *Held*, attachment is merely an incident to a suit, and unless suit can be maintained, attachment must fall. Defendant was not here suable in Iowa, and consequently no attachment could issue against his property.

CLARK v. WELLS.

Reported in 203 U. S. 164.

(1906.)

MR. JUSTICE DAY delivered the opinion of the court: This case is here upon a question of jurisdiction of the circuit court, duly certified under the Act of March 3, 1891, 26 Stat. 826.

The action below was commenced by Wells against Clark, September 20, 1904, in the district court of the first judicial district of Montana, in and for Lewis and Clark county, to recover on a promissory note in the sum of \$2,500, with interest and costs. The summons in the action was returned September 22, 1904, with the indorsement by the sheriff that Clark could not be found in this county.

An attachment was sued out under the statutes of Montana (Code of Civil Procedure, Sections 890, *et seq.*), and, on September 22, 1904, was levied upon all the right, title and interest of the defendant Clark in certain lots in Butte, Silver Bow county, Montana.

On October 18, 1904, Clark, appearing for the purpose of obtaining an order of removal, and no other, and reciting that he waived no right to object to the jurisdiction of the court over his person or property, filed his petition in the district court of Lewis and Clark county for the removal of the cause to the circuit court of the United States for the district of Montana, upon the ground that he was a resident of San Mateo, California, and a citizen of that state, plaintiff being a citizen of Montana.

Upon bond filed such proceedings were had that the cause was ordered, on October 18, 1904, to be removed to the United States circuit court for the district of Montana.

After the filing of the record in the United States court an affidavit was filed on November 3, 1904, in the office of the clerk of the United States circuit court for an order for service by publication upon Clark as a nonresident, absent from the state, who could not be found therein. An order was thereupon made by the clerk of the United States court for service upon Clark by publication in a newspaper in the city of Helena, Lewis and Clark county, and the mailing of a notice to San Mateo, California, the alleged place of residence of the defendant. This method of procedure is in conformity with the Code of Civil Procedure of Montana, Sections 637, 638. Publication was made, and a copy of the summons and complaint was served upon Clark at San Mateo, California, by the United States marshal in and for the northern district of California. Sections 637, 638, Civil Code of Procedure of Montana.

On December 6, 1904, Clark, appearing solely for that purpose, filed a motion to quash the service of summons upon two grounds:

"1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the

state and district of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

“2. That the publication of service herein, wherein and whereby the said summons has been published in a newspaper does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States.”

The court overruled the motion and proceeded to render a judgment *in personam* against Clark for the amount of the note and costs.

It is contended by the plaintiff in error that inasmuch as the removal was made to the federal court before service of a summons upon the defendant, and, as there was no personal service after the removal, there could be no valid personal judgment in that court for want of service upon the defendant. And it is insisted that the service by publication, if proper in such cases, could not be made under the state statute, but under the Act of March 3, 1875, 18 Stat. 472, 1 Comp. Stat. 513, permitting the court to make an order for publication upon nonresident defendants in suits begun in the circuit court of the United States to enforce any legal or equitable lien upon a claim to real or personal property within the district where suit is brought.

It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction or waiver of summons and voluntary appearance therein. *Pennoyer v. Neff*, 95 U. S. 714; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 444, and cases cited.

Nor did the petition for removal in the form used in this case have the effect to submit the person of the defendant to the jurisdiction of the state court, or, upon removal to the federal court deprive him of the right to object to the manner

of service upon him, *Goldey v. The Morning News*, 156 U. S. 518, and the exercise of the right of removal did not have the effect of entering the general appearance of the defendant, but a special appearance only for the purpose of removal. *Wabash Western Ry. v. Brow*, 164 U. S. 271, 279.

But we can not agree with the contention of counsel for plaintiff in error, that as a personal judgment can only be rendered upon personal service, and service by publication under the state statutes can not be made in the federal court, and that the United States statute (Act of March 3, 1875, 18 Stat. 470, 472), is inapplicable to the case, the effect of the removal is to render nugatory the attachment proceedings in the state court.

The purpose not to interfere with the lien of the attachment in the state court is recognized and declared in the statute (Section 4 of the Removal Act, 24 Stat. 552), providing that when any suit is removed from a state court to the circuit court of the United States an attachment of the goods or estate of the defendant, had in the suit in the state court, shall hold the goods or estate attached to answer the final judgment or decree in the same manner as by law it would have been held to answer the final judgment or decree had it been rendered by the court in which the suit was commenced, and preserving the validity of all bonds or security given in the state court.

The transfer of the cause to the United States court gave the latter court control of the case as it was when the state court was deprived of its jurisdiction. The lands were still held by the attachment to answer such judgment as might be rendered against the defendant.

The defendant had a right to remove to the federal court, but it is neither reasonable nor consonant with the federal statute preserving the lien of the attachment, that the effect of such removal shall simply be to dismiss the action wherein the state court had acquired jurisdiction by the lawful seizure of the defendant's property within the state.

When the jurisdiction of the state court was terminated by the removal that court had seized upon the attached property

with the right to hold it to answer such judgment as might be rendered. In the absence of personal service the state statute provided for publication of notice of the pendency of the suit. If the defendant failed to appear the court might proceed to render a judgment, which would permit the attached property to be sold for its satisfaction. To render such a judgment in the absence of an appearance and defense, the state court had only to require the statutory notice to the defendant when its proceedings were interrupted by the removal to the federal court on the application of the defendant.

The federal court thus acquired jurisdiction of a cause of which the defendant had notice, as appears by his petition for removal and the action of the state court invoked by him. The defendant, it is true, had not been personally served with process or submitted his person to the jurisdiction of either the state or federal court. But he did not attack the validity of the attachment proceedings, which appear to be regular and in conformity to the law of the state. There was no necessity of publication of notice in the federal court in order to warn the defendant of the proceeding; he knew of it, and to a qualified extent had appeared in it.

Without further notice to him, the court had jurisdiction to enter a judgment enforceable against the attached property. The judgment purported to be rendered as upon personal service and after a finding by the court "that the so-called special appearance for the removal hereinbefore recited was an absolute and unqualified submission to the jurisdiction of this (the federal) court."

There are expressions in the opinion of the learned judge of the circuit court to the effect that the judgment rendered was intended to be effectual only to subject the attached property (136 Fed. Rep. 462), and it seems to be in the form used in some jurisdictions, which recognize that the property attached is all that is reached by the judgment rendered. But the judgment is absolute upon its face, and entered after a finding of full jurisdiction over the person of the defendant. It is in such form as can be sued upon elsewhere and be

pleaded as a final adjudication of the cause of action set forth in the petition, and be executed against other property of the defendant, whereas the court had only jurisdiction to render a judgment valid against the property seized in attachment.

We hold that, to the extent that it rendered a personal judgment absolute in terms, the court exceeded its jurisdiction in the case, not having by service or waiver personal jurisdiction of the defendant.

The judgment to that extent is therefore modified and made collectible only from the attached property. So modified, the judgment is *affirmed*.

In *Laborde v. Ubarri*, 214 U. S. 175, the court follows *Ex parte Railway Co.*, 103 U. S. 794, saying; that "attachment is but an incident to a suit, and unless the court has jurisdiction over the person of the defendant the attachment must fall."

In *Davis v. C. C. C. & St. L. Ry.*, 217 U. S. 157, suit was filed against a foreign corporation in a state court, property was attached and notice of suit and attachment served on defendant at its chief office and place of business in the foreign state. Removal was had to federal court where motion was made to quash the service of attachment and garnishment under special appearance for that purpose. *Held*, special appearance could be made to contest the attachment because the corporation was in court only through the attachment and a special appearance therefore was one to contest jurisdiction. The court also dismissed the cause of action on ground of no jurisdiction of the defendant or the attached property, but the supreme court here holds that the property was not exempt from process under the state laws and the court therefore had jurisdiction over it and through it of the defendant railway company, citing *Clark v. Wells*, 203 U. S. 164.

In *United States v. Brooke*, 184 Fed. 341, United States sues Brooke of England in United States district court, southern district, New York. No personal service; attachment of defendant's property in district. Motion to vacate the attachment on ground of no jurisdiction over person of defendant; *granted*, citing *Ex parte Railway*, 103 U. S. 794, and other cases, that attachment is an incident merely of the suit, and the United States is in the same position here as an individual plaintiff. Not stated in the report whether notice given by publication.

The distinction to be noted here is that the attachment is enforced in removed cases, but not in cases originally brought in the federal courts.

See, also, Judicial Code of 1911, Section 37.

SMITH v. REED.

Reported in 210 Fed. R. 968.
(1912.)

DAY, District Judge: In this case the defendant Reed has filed a motion asking the court to set aside and quash the service of summons herein upon said defendant, for the reason that the court has no jurisdiction over the person of said defendant.

An attempt was made to secure personal service upon the defendant, which service was plainly deficient. Accordingly no personal service was made upon the defendant, but an attachment was issued under a proper affidavit under the state practice, and the property of the defendant was seized. An affidavit for service by publication under the Ohio statute was filed and published according to law.

The question which arises, is this: Can this court acquire original jurisdiction of the defendant, William Reed, by proceedings in attachment, in accordance with the laws of Ohio, against the property of said Reed found within the limits of this division and district?

It might be said, in passing, that since the petition was originally filed by leave of court, it has been amended. This amendment does not change the parties to the original cause of action, nor does it change the original cause of action set forth in the original petition. The legal effect of the amendment is to render the petition as though it had originally read as amended, and this amendment establishes the existence of the jurisdiction from the commencement of the suit. *Carnegie, et al., v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248.

The jurisdictional statute applicable to this case, is Act of March 3, 1875, c. 137, 18 Stat. at Large, 470, as amended by Act of August 13, 1888, c. 866, 25 Stats. at Large, 434, and is found in Chapter 2, which is a chapter on jurisdiction of the so-called Judicial Code, being the Act of March 3, 1911 (U. S. Comp. St. Sup. 1911, p. 150). This act gives to the district court, formerly the circuit court, jurisdiction where there is a "controversy between citizens of the state and foreign states, citizens or subjects," where the matter in contro-

versy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

Following this general ground of jurisdiction, as found in the Act of March 3, 1875, as amended by the Acts of March 3, 1887, and August 13, 1888, is this language:

“And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”

In the Judicial Code passed March 3, 1911, as has already been observed, the jurisdiction of the district court is found in Section 24 under Chapter 2 on Jurisdiction. The provision last quoted is found in Section 51 of said act, under Chapter 4, entitled Miscellaneous Provisions.

Section 915 of the Compiled Statutes of the United States reads as follows:

“Attachments:

“In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.” U. S. Comp. St. 1901, p. 684.

This court has adopted rules making the provisions of the Ohio statutes relating to attachments applicable to proceedings in this court. The statutes of Ohio, under Section 11292 of the Ohio General Code, provide for the institution of foreign attachments on the ground that the defendant is a non-resident of the state of Ohio. This ground of attachment, on

the basis of nonresidence, is specified in Section 11819 of the Ohio General Code.

There is no controversy but that under the statutes of the state of Ohio the commencement of a suit against a non-resident by attachment is authorized. It is, however, urged by counsel for the defendant that an attachment is but an incident to a suit, and that unless suit can be maintained the attachment must fall. In other words, unless this court has jurisdiction, not only over the person of the defendant, but also over the subject-matter, this suit can not be maintained. And the fundamental question arises as to whether this court can acquire jurisdiction over an individual defendant residing outside of the district, by attaching the property of the defendant found within the district.

The language employed in Section 51 of the Judiciary Act, providing that where jurisdiction is founded only on the act as between citizens of different states, and that suits shall be brought only within the residence of either the plaintiff or defendant, is insisted by the defendant to be not jurisdictional, but simply such language as gives the defendant a privilege which he may or may not assert at the proper time. It is important to note that this language is placed in the new Judicial Code among the miscellaneous provisions, and does not appear in the chapter conferring jurisdiction upon the court. This portion of the acts in reference to the citizenship of the parties to the suit was considered in the case of *Bogue v. Chicago, Burlington & Quincy R. R. Co.* (D. C.), 193 Fed. 728, 731, where the court said:

“Plaintiffs’ counsel, both in oral argument and by brief, was utterly mistaken as to the effect of the statute prescribing the place of bringing an action. This statute is in no sense jurisdictional. The plaintiff has a legal right to bring his action in any district of the United States other than where both are citizens of the same state and there, in the event of lawful service, the case will go to a valid judgment, unless the defendant timely objects to plaintiff maintaining the case in a district other than where either the one or other resides. It is a mere privilege that the defendant can waive, or timely protest against. It is not jurisdictional.”

Discussing the jurisdiction of the federal courts in attachment, Foster on Federal Practice, vol. 2 (4th ed.), p. 1254, says:

“These rules and the statute do not give a circuit or district court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein (citing cases). * * * It is doubtful whether the writ of attachment can be issued in a suit originally instituted in a federal court, before jurisdiction has been obtained by service of original process.”

In the case of *Ex parte Railway Co.*, 103 U. S. 794, 26 L. Ed. 461, a suit was commenced in the United States circuit court for the district of Iowa against a citizen of Massachusetts, by which the plaintiff sought to acquire jurisdiction by attaching the defendant's property, on the ground that he was a non-resident. No personal service was made on the defendant, and on his setting up a plea to the jurisdiction, the court dismissed the suit and dissolved the attachment.

Chief justice Waite, speaking for the court, at p. 796 of 103 U. S. (26 L. Ed. 461), said:

“It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the state of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the circuit court of the district of Iowa, and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.”

This doctrine announced by this opinion that an attachment is but an incident to a suit and must fall unless the suit itself can be maintained against the defendant, irrespective of the attachment, was again considered in the case *Laborde v. Ubarri*, 214 U. S. 173, 29 Sup. Ct. 522, 53 L. Ed. 955. At page 174 of 214 U. S., at page 552 of 29 Sup. Ct. (53 L. Ed. 955), Justice Holmes, when delivering the opinion of the court said:

“There is presented here a subordinate question as to the right of the plaintiffs in error, who were also the plaintiffs below, to retain an attachment against property alleged to belong to two nonresident heirs of Pablo Ubarri. The district

court ordered the complaint to be dismissed as to these heirs and the attachment against any of their property to be dissolved, on the principle that has been laid down more than once by this court that in the courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' *Ex parte Railway Co.*, 103 U. S. 794, 796 (26 L. Ed. 461). 'Unless the suit can be maintained' means, of course, unless the court has jurisdiction over the person of the defendant. See, further, *Toland v. Sprague*, 12 Pet. 300, 330, 336 (9 L. Ed. 1093); *Chaffee v. Hayward*, 20 How. 208 (15 L. Ed. 851); *Clark v. Wells*, 203 U. S. 164 (27 Sup. Ct. 43, 51 L. Ed. 138)."

It is contended by counsel for the plaintiff that a number of these cases, especially the case in 103 U. S., and the basic case of *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, were decided when the statute contained a requirement that the suit could be instituted in the district in which the defendant was an inhabitant, or in which he might be found, and that since the additional legislation, providing that suit might be brought in the district of the residence of either the plaintiff or defendant, these decisions would lose their force. This would be if they were jurisdictional, but if the legislation in this respect only gives the privilege to the defendant and is not jurisdictional, these decisions referred to by Justice Holmes would have all of the force which it is contended by counsel for defendant they possess.

Counsel for plaintiff very ably contend that the case of the *Boston & Maine Railway v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002, expresses the position they take in this matter. It appears to me that the court held in the Gokey case that the division superintendent of the railway was a known agent, and that service upon him in an attachment suit was proper under the Vermont statutes. I can not perceive that the court held in this case that the federal courts would take jurisdiction of a nonresident defendant solely by virtue of an attachment of property. It appears to me that the language in Justice Holmes' opinion, in the case of *Laborde v. Ubarri*, in 214 U. S., redeclared the doctrine of *Toland v. Sprague*, and established it as the law which must be observed

to a suit, and that unless the suit can be maintained, that is, unless the court has jurisdiction over the person of the defendant, the attachment must fall.

It is urged by counsel for plaintiff that in the case of *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138, and *Davis v. Cleveland, C., C. & St. L. Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N.S.) 823, 18 Ann. Cas. 907, the jurisdiction of the federal courts in foreign attachments is recognized. Both of these suits were originally instituted in the state court and service procured by attachment. The question arises on removal to the federal courts. Justice Day, in deciding the case of *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138, overruled the contention of the plaintiff that the effect of the removal was to render nugatory the attachment proceedings in the state court upon the express ground that Section 4 of Removal Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 514), prohibited this. It is quite apparent in this decision last referred to that the defendant by having the cause removed to the federal court waived the personal privilege contained in Section 51 of the Judicial Code.

In a very recent case, that of *United States v. Brooke* (D. C.), 184 Fed. 341, which was a suit for the United States against two parties, arising out of the violation of the custom laws, in which the government sought to seize property of non-residents, by warrant of attachment, without personal service, Judge Hazel says:

“The attachment herein must be vacated on the ground that jurisdiction has not been obtained over the person of the defendants. According to the moving papers, the defendants are residents of * * * England. * * *

“The authorities uniformly hold that to merely find property of a defendant in the district does not mean finding the defendant therein, for the purpose of bringing suit against him.”

After referring to the Conformity Acts, the court said:

“But such provisions do not expressly or impliedly give a United States district court jurisdiction of proceedings *in rem* against the property of a nonresident defendant who has not

been personally served. The supreme court has held that the attachment is only an incident of the suit (citing 103 U. S. and 214 U. S.). And common law actions can only be brought in the United States circuit and district courts in the district of which the defendant is an inhabitant, or in which he is found at the time of serving the process, or, to give the court jurisdiction, he must voluntarily appear."

The cases which hold that where a state court has acquired jurisdiction of the defendant, through its property, and could enter a judgment enforceable against such property, I think, can be distinguished from the facts and the situation here presented by the case at bar; it being held in these decisions that the defendants did not submit their persons to the general jurisdiction of the court, but that the property could be proceeded against up to the amount of the attachment in the state court.

It having been held, however, by the supreme court of the United States that personal service was necessary to institute a suit in the federal courts, these decisions commented upon by counsel for plaintiff would not be controlling.

Motion to quash service sustained, and exceptions given to the plaintiff.

Venue statute (Section 51, Judicial Code, 1911), does not apply to proceeding in admiralty. See a case of libel *in personam*, *The Louisville Underwriters*, 134 U. S. 488, involving similar provision of Act of March 3, 1887 (24 Stat. L. 552, Section 1, c. 373).

(cc) In suit to remove cloud on title.

DICK v. FORAKER.

Reported in 155 U. S. 404.
(1894.)

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court: The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought. The defendant was a citizen of another state. The case was obviously within the jurisdiction of the court. Revised Statutes, Section 738, Act of March 3, 1875, c. 137, Section 8, 18 Stat. 470; Act of August 13, 1888, c.

866, Section 5, 25 Stat. 433; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352; *Arndt v. Griggs*, 134 U. S. 316; *Greeley v. Lowe*, *ante*, 58.

The contention is that the law giving jurisdiction, as against a person not a citizen of the district where suit is brought to remove a cloud from the title to real estate, situated therein, applies only to cases where there are two or more defendants, at least one of whom must be found in the district where the suit is brought; that the jurisdiction exists to entertain a suit, like the one before us, where there are two or more defendants, but not where there is only one. It was admitted that this contention is unsound as applied to Revised Statutes, Section 738, but it is insisted that the point is well taken in consequence of a change resulting from the re-enactment of Revised Statutes, Section 738, to be found in Section 8 of the Act of March 3, 1875. The Revised Statutes gave the right to bring such a suit where "any defendant" resided out of the district. The Act of 1875 gives the right "where one or more" may so reside. We see no force in this argument, which in effect eliminates the word "one" from the statute and replaces it by the word "two," thus causing it to read "two or more," instead of "one or more." The suggestion that as the words "one or more," in Section 737, Revised Statutes contemplated a controversy in which two or more defendants would be involved, therefore the words "one or more" mean the same in the Act of 1875, is fallacious.

Section 737 provides for a case where there are "several defendants" and "one or more" may be outside of the district; the Act of 1875, on the contrary, provides for a case where "one or more of the defendants" may be outside of the district, the difference between the two being that which exists between "one or more of several" and "one or more." The demurrer was, therefore, correctly overruled.

Such jurisdiction is now conferred by Section 57 of the Judicial Code. Concerning the application of said section even to a case where the remedy sought is provided by state statute, and the alleged cloud arises from an instrument clearly void, see *L. & N. Ry. v. Western U. Tel. Co.*, 234 U. S. 369.

In *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553, the suit being brought in Northern District of Ohio, Western Division, the court, at p. 555, says:

"The complainant in this case is a nonresident of this district, and is a citizen of the state of New York. The defendants, who claim an interest and title to the real estate in controversy, are all residents and citizens of the state of Michigan. The property in dispute lies wholly within the western division of this district. The question, therefore, presented, is whether this court, in a suit in which neither the plaintiff nor the defendants reside in the district, but are citizens of different states, can acquire jurisdiction, and determine controversies between the parties, when the real estate in controversy lies wholly within the jurisdiction of the court. Under the last act of congress above referred to, it is well settled that, where the jurisdiction of the court depends upon diverse citizenship of the parties, either the plaintiff or the defendant must be a resident and citizen of the district. Counsel for the defendants contend that, inasmuch as neither the plaintiff nor the defendants are citizens of this district, the suit can not be said to be 'commenced,' under Section 738, because the court has no personal jurisdiction over either of the parties. And they contend, further, that a lien or equitable claim to real estate in this district can not be enforced under said section unless either the plaintiff or the defendants are citizens of the district. In this contention, I think, counsel are wrong. Section 738 was originally the eighth section of the Act of March 3, 1875. It was incorporated into the Revised Statutes as Section 738. Section 739 specially provides as follows:

"'Except in the cases provided in the next three sections, no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and except in the said cases, and in the cases provided by the preceding section (which is Section 738), no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or that in which he is found, at the time of serving the writ.'

"We therefore have in this section a legislative construction of Section 738, and that construction is that a suit could be 'commenced' in a district in which the real estate concerned was situated, without reference to whether the defendants could be personally served in the district or not. Personal service of process was not, therefore, essential to give the court jurisdiction under Section 738, as section eight of the Act of March 3, 1875. As that section remains in force by special provision of the Act of August, 1888, the legislative construction placed thereon also stands. It is sufficient, therefore, to give the court jurisdiction, if the real estate involved is within this district, and the parties are citizens of different states. I find nothing in the opinions of the court in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. Rep. 303, or in *Ames v. Holderbaum*, 42 Fed. Rep. 341, inconsistent with this conclusion."

Compare R. S. U. S., Section 738, with Judicial Code, Section 57, and Section 739 with Judicial Code, Section 51; note changes.

As to distinction between local and transitory actions, see opinion of Chief Justice Marshall, on circuit, in *Livingston v. Jefferson*, 15 Fed. Cases, No. 8411, at pp. 663, 664.

PEREZ v. FERNANDEZ.

Reported in 220 U. S. 224.

(1911.)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court : Jose Antonio Fernandez, a judgment creditor of Jose Perez, in October, 1906, commenced in the court below this suit to unmask alleged fraudulent and simulated mortgages and sale of certain described real property of Perez, the judgment debtor, to the end that such property might be made available to pay the unsatisfied judgment debt. The defendants were Jose Perez, Victor Ochoa and his wife, all three alleged to be citizens and residents of Spain and ten persons alleged to be citizens and residents of Porto Rico who were averred to be and were sued as the heirs at law of one Maristany. It was alleged that in the years 1899, 1900 and 1902, Perez, who was the registered owner of certain enumerated real estate, had executed and recorded deeds purporting to mortgage the same in favor of Ochoa and Maristany. These deeds, it was alleged, were simulations executed by Perez with the sole purpose of defrauding his creditors and preventing them from collecting their debts. It was additionally charged that to carry out the wrongful purpose which had caused the acts of mortgage to be drawn and recorded and in consequence of a conspiracy between Perez and Ochoa, the latter had in May, 1906, sued in the court below to foreclose the apparent mortgages, and had procured an order of sale and a sale thereunder to be made by the marshal of the court, and at such sale had seemingly bought in the property and received a deed therefor. Ochoa, the alleged plaintiff, was charged to have been but an interposed person acting, not for himself, but for Perez, the ostensible defendant. Finally, it was charged that the property standing in the name of Ochoa, the alleged purchaser, had despite the sale continuously remained under the dominion and beneficial control of Perez. The prayer of the bill was for a decree recognizing the fraudulent and simulated char-

acter of the alleged mortgages and sale, that they be declared to be mere shadows cast upon the title of Perez and that the decree further direct that the property belonging to Perez be ordered to be sold to pay the judgment debt.

The ten persons who were made defendants as heirs or representatives of Maristany having been personally summoned and having failed to appear, the bill was, in December, 1906, taken for confessed against them. On the third day of June, 1907, the counsel for the complainant moved for an order to summons by publication Jose Perez, Victor Ochoa and his wife. The motion for this order was supported by a return of the marshal showing that the subpoena issued to the parties named had not been served, because the marshal, after diligent inquiry, had been unable to find them in the district, and by an affidavit of counsel declaring that affiant "is unable to learn of the present whereabouts of said defendants, Jose Perez y Fernandez, Victor Ochoa y Perez and his wife, Dolores Olavarria, after duly inquiring, and that, therefore, personal service upon them is not practicable." The order was granted, directing that the defendants named be summoned by publication to appear on or before the third day of August, 1907, the publication to be made "in a newspaper of general circulation in Porto Rico, to wit, 'La Bandera Americana,' once a week for six consecutive weeks." On September 13 following the defendants named not having appeared and proof of publication having been made, the bill was taken for confessed against them. On February 1, 1908, a formal decree was entered against all the defendants, holding the mortgages and sale to be void as mere simulations, and directing their erasure from the records. The decree recognized the right of complainant to collect his unsatisfied judgment by a sale of the property, and in fact directed the marshal to proceed under an execution which was in his hands to levy upon and sell the property,

Within two months after the entry of this decree and before the marshal had executed it by sale of the property, appearance was entered for Jose Perez, one of the defendants, and shortly after for Ochoa, and application was made in the name of both to vacate the decree and allow them to defend the suit,

on the ground that they were entitled to do so because they had not been personally notified. At the same time, in the same court, a Mrs. Perfecta Blanco, alleging herself to be a resident of Spain, filed her bill against the marshal as well as against Jose Fernandez and his attorneys of record, alleging that the complainant had in July, 1906, bought from Ochoa the real estate described in the Fernandez suit and that she was entitled to hold the property free from liability under the execution in the Fernandez case. The prayer was for an injunction pending the suit restraining the marshal from selling the property to pay the Fernandez judgment and for a final decree perpetuating the injunction. The application made by Perez and Ochoa to set aside the decree and allow them to appear and defend, and that of Mrs. Blanco for a preliminary injunction, were considered by the court at one and the same time. The court stayed, for a brief period, the sale of the property under the execution issued in the case of *Fernandez v. Perez* and the enforcement of the decree in the equity clause. In a memorandum opinion the court declared that this had been done for the following reasons:

First, to enable Perez and Ochoa "to make a first-class showing establishing that neither of them had before the decree in the equity cause, any actual personal notice or knowledge of its pendency," and that, they or either of them never received any notice or knowledge of the pendency of the same through any of the other respondents in the same mentioned or through any of their *apoderados*, agents, tenants or others, either in Porto Rico or in Spain before said time, and that they, or either of them, did not personally receive a copy of or hear of or know of the publication of the notice of the pendency of said suit (the equity cause) in 'La Bandera Americana' * * * and that they or either of them never in fact previous to the entry of the decree, received any copy of said newspaper containing such notice through the mails from Jose Antonio Fernandez, or any other person, or see or hear of such copy being received by any other person in their vicinity in Spain." Second. In order to enable Perez and Ochoa to make "a first-class showing under oath that they in truth and in fact have a meritorious defense to the bill" and to give both Perez and

Ochoa an opportunity to swear that the "mortgage to Ochoa in 1899 was in good faith and for a valuable consideration and that the foreclosure of the same was not collusive, * * * " and that Ochoa must also state that his alleged sale to Mrs. Blanco of the property was made in good faith and for valuable consideration as in the deed stated, and if not for that amount then for how much, and that the said deed was made by said Ochoa without the knowledge of the decree in said equity cause, and "if possible he must furnish the affidavit of Mrs. Blanco," stating that her purchase was an honest one and how much she paid for the property.

The stay granted by the court was extended from time to time. There were hearings and, it may be, some evidence tending to show the existence of the facts referred to by the court in the conditions upon which it granted the stay and there was evidence to the contrary. Finally the court disposed of the matter by refusing to set aside the decree in the equity cause and hence declining to allow Perez and Ochoa to defend and refusing to grant the application for a preliminary injunction on the bill of Mrs. Blanco.

From a final decree rejecting their application to set aside the equity decree and allow them to defend Perez and Ochoa appeal.

The defendants Perez and Ochoa being citizens of Spain, the court had general jurisdiction. Act of March 2, 1901, c. 812, Section 3, 31 Stat. 953. Power to award relief because of the situation of the property within the court's jurisdiction and the character of the rights asserted in and to the property even although Perez and Ochoa were nonresidents of the district and could not be found therein, depended, as recognized by the court below and by the parties, upon the Act of March 3, 1875, c. 137, Section 8, 18 Stat. 472. The right of the absent parties defendant to have the suit reopened and the duty of the court to permit them to make defense depended upon the proviso to the section in question. That proviso reads as follows:

"Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said

circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.”

As the appearance of Perez and Ochoa was within the year their right to have the decree set aside depended upon whether they had been “actually personally notified” (in the case where in the judgment was rendered), “as above provided.” Treating the words “actually personally notified” as signifying information conveyed to them in any form of the existence of the suit and concluding from the facts before it that it was established that both Perez and Ochoa had been notified, either by information conveyed to them by persons in Porto Rico, or by the receipt of a copy of the newspaper containing the publication of notice, which the court had directed to be made, the right to appear and defend was denied. But we think the construction of the statute, which the court must necessarily have adopted in order to enable it to reach such conclusion was a mistaken one. The right to appear and defend within the year is given by the proviso to all defendants who have not been “actually personally notified as above provided.” To determine, therefore, whether a defendant who appears and asks to be allowed to defend has been actually personally notified in such a manner as to exclude him from the enjoyment of the right involves ascertaining not whether he had been notified in any possible manner, but whether he had been “actually personally notified as above provided,” that is, as required by the previous provisions of the section. Now, the previous provisions are these: 18 Stat. 472, c. 137, March 3, 1875, Section 8:

“That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be

lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be. * * *

After thus giving authority to the court to authorize the actual personal service of a notice outside of the district, the statute then, in cases where such personal notice is impossible, provides for publication as follows: "Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. * * *

Plainly, therefore, the previous provision to which the proviso applies exacts an actual personal notice resulting from the service on the party outside of the district of an order of the court directed to him and requiring him to appear and defend within a time stated, the whole conformably to the express terms of the statute. In other words, where the property is situated in the district where the suit is brought as provided in the statute the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication calling upon the party to appear and defend within the statutory time, this latter notice, however, being only necessary where the former method can not be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense. That is to say, the statute, without ambiguity, confers the right to have the case reopened wherever the jurisdiction of the court has rested upon publication and denies such right where the requirements of the statute as to actual personal notice have been complied with. It follows that in a

case where the method for giving the actual notice pointed out by the statute has not been resorted to, and, on the contrary, publication of notice was the basis of the jurisdiction of the court, an inquiry as to information conveyed by letter or by other means of knowledge of the pendency of the suit to a defendant, for the purpose of determining whether such defendant has a right to appear within the year and have the case opened to enable him to defend, is wholly immaterial. We say this because, from the text of the statute as above elucidated, it clearly results that the right which it confers to have a case reopened is rested upon the criterion afforded by the record upon which the judgment was obtained, and is not caused to depend upon the uncertainty which might result from a resort to matters extraneous to the record. As the misconstruction by the court of the statute in the respect just stated requires a reversal, it is not essential that we should go further. In order, however, that misconception may be avoided we think it well to observe that in the cases to which the statute applies the right to appear and have a cause reopened is not dependent upon terms to be fixed by the court, except to the extent that the statute provides for terms as to costs. This, we think, is clear, since, after providing for the entry in the circuit court of his appearance by a defendant embraced within the statute, it is said: "And thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; * * * ."

Reversed and remanded with directions for further proceedings in conformity with this opinion.

f. Miscellaneous jurisdiction.

Attention is called to the specific grounds of jurisdiction of the district court in the remaining twenty-four paragraphs of Section 24 of the Judicial Code, several exclusive, as enumerated in Section 256, the others concurrent with the courts of the states.

Also, in connection with paragraph "twentieth," consider the court of claims, its organization, jurisdiction and procedure, as provided in Sections 136 to 187 of the Judicial Code. The limits of this book will not permit the inclusion of cases dealing with such claims.

ADMIRALTY AND MARITIME JURISDICTION. Since this subject receives separate treatment in a curriculum it is omitted here; the same reason exists for the omission of Patents, Mining and Irrigation, and Bankruptcy, all being highly specialized branches of federal law.

g. Removal of causes.

Compare with 1 Stat. L., p. 73, Act of September 24, 1789, Section 12, Removals, the Act of March 3, 1875, 18 Stat. L. 470, and the Act of August 13, 1888, 25 Stat. L. 433, as follows: Act of March 3, 1875, Sections 2 to 7, inclusive, and Act of August 13, 1888, 25 Stat. L. 433, Sections 2 and 3, on pp. 434, 435.

(a) Diversity of citizenship.

APPEL CO. v. BAGGOTT.

Reported in 132 Federal, 1005.
(1904.)

ON motion to remand to state court. S. S. Meyers, for plaintiff. Baggott & Ryall, for defendants.

THOMAS, District Judge: The plaintiff resides in the state of Colorado, Baggott resides in the state of New York, and Ryall in the state of New Jersey. Both were served with the summons and complaint in the borough of Manhattan, in the southern district of New York. The action was removed to this court upon the petition of Ryall and the consent of Baggott. The cause of action is for libel published in the state of New York, signed by defendants under the name of "Baggott & Ryall," in the course of business in which they were engaged as copartners.

Under the Removal Act, Baggott, not being a nonresident, could not remove the action to this court. *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602. The act so provides. The suit could not have been begun in the federal court against Ryall, a resident of New Jersey, by service upon him in the state of New York. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635. Hence, there can be no removal as to him. The rule would be different as to an alien. *Bowers v. Atlantic G. & P. Co.* (C. C.), 104 Fed. 889; *In re Hohorst*, 150 U. S. 650, 14 Sup. Ct. 221, 37 L. Ed. 1211.

This action should be remanded.

CLARK v. WELLS.

Reported in 203 U. S. 164.

(See above, p. 396.)

REMOVAL CASES.

Reported in 100 U. S. 457.

(See below, p. ...)

SMITH v. RINES.

Reported in Fed. Case 13100 (2 Sumner, 338).

(1836.)

STORY, Circuit Justice: * * *. But if these difficulties in the case could be overcome, there are others, which, upon the construction of the twelfth section of the act, seem absolutely insuperable. In the first place, the act contemplates that the removal of the cause is to be with the joint assent of all the parties defendant; for it can scarcely be treated as a privilege of one defendant, exclusive of the others. Suppose the present suit were brought against several aliens, or several citizens of another state, and some of the defendants were in favor of a removal of the suit from the state tribunals, and others against it, which of them are to prevail? The act seems intended to give an option to the party defendant, which may be exercised or not, at the pleasure of all standing in the same predicament. But if one may remove without the consent of the others, then, the option may be defeated at the pleasure of one only. My brother, Mr. Justice Thompson, has put the case strongly, in delivering the opinion of the court in the case of *Ward v. Arredondo*. "Can," (said he) "then, one of the alien defendants compel his codefendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we can not discover any satisfactory ground upon which such a doctrine can be sustained. The Judiciary Act considers the removal of the cause as the voluntary act of the party on his petition. By the word party, as here used, must necessarily be understood the defendant, embracing all the individuals, be they more or less constituting such party." This reasoning upon the face and purport of the act appears to me to be unanswerable in the case put. It equally, in my judgment,

applies to every other case where all the defendants have not (as they have not in the present case) petitioned for the removal. The application must be joint, for the benefit of all, and with the consent of all. Indeed there is a more urgent ground for its application, if the suggestions, already made, are well founded; for the defendants in this case, who are citizens of Massachusetts, are *per se*, incapable of removing the suit. Can they be placed in a better predicament, than if they had united in the petition with one, who was a citizen of another state, and therefore capable?

And this leads me, in the next place, to the consideration, which has been so strongly urged at the bar, as to the right of removal of a cause in part from a state court, leaving it still, as to other parties, depending therein. It appears to me that the very terms of the act prohibit any such partial removal of a suit. It declares that when the petition and surety are properly offered and given, "it shall then be the duty of the state court to accept the surety, and proceed no further in the cause," which language necessarily supposes an entire removal of the cause, and not a removal of it as to some parties only. The circuit court, too, is to proceed therein in the same manner, as in original suits commenced in that court. So that in all cases, where the local law would govern in the decision upon the forms or merits of the proceeding in an original suit, it must in like manner govern in those forms and proceedings in the removed suit. It is plain that there can be nothing in the nature of a summons and severance in the suit; for that supposes that some parties have a right to proceed to establish their claim as plaintiffs, there being other parties necessary to be joined in point of form as plaintiffs, who are unwilling to proceed at all. Such a proceeding is never allowed as a severance of a suit at the common law, as to the parties defendant, so as to make two several suits out of one joint suit.

But independent of the language of the act, how would it be possible, upon any acknowledged principles of law, to proceed in this suit in the state court, as to some parties, and in this court as to other parties, treating it (as it certainly must be treated) as a joint suit, upon which there may be a joint, as well as a several judgment? Consider, for a moment, the posture of the

case, if the suit is removed as to Rines, and is still proceeded in in the state court, as to all the other defendants, upon whom process has been served. Both courts must render such a final judgment upon the whole cause of action, as the local law (which in this case is the common law) requires, upon the whole record. The final judgment must be just such a judgment as would be warranted by law, if all the parties were before either court. and there had been a final trial as to all the defendants, upon joint or separate pleadings. Now, the first difficulty, which occurs is, how, after the removal of a part of the cause from the state court to the circuit court, either court can judicially know what is finally done as to the residue by the other court. The further proceedings in either court. after such a removal, constitute no part of the record of the proceedings of the other court; and no process of *certiorari* lies to bring them before the other. Suppose that all the defendants in the state court should be convicted on trial, and damages of one thousand dollars be jointly assessed against them by a jury; and suppose the damages should, in like manner upon trial, be rendered against Rines in the circuit court, more or less than the damages assessed in the state court, what judgment is to be rendered? The plaintiff, in such a case, would by law be entitled to a joint judgment against all the defendants, *de melioribus damnis*. Where on the record of either court could be found the materials for such a judgment? Nay, more; where could be found the materials to show that any verdict at all had been rendered in the other court? Suppose some of the defendants in the state court should be acquitted, and others convicted, and damages assessed against the latter in the state court, and damages also assessed against Rines in the circuit court to the same amount, or to a greater or less amount, what judgment is to be rendered in either court? It is plain that the plaintiff would be entitled to a joint judgment against all the defendants, who were connected, and against execution. But in what manner can either court proceed to enter such a judgment, there being on its own records no proof of the proceedings in the other court? Suppose Rines, upon a trial here, should be acquitted, and some of the defendants in the state court should also be acquitted, and others convicted, what is to be done? We all know that if the final

judgment in the cause were wholly in either court it would be a general judgment, that all the defendants acquitted should go without day; and that the plaintiff should recover his damages against the other. A several judgment as to some of the defendants, without disposing of the others, would, upon the clearest principles of the common law, be bad and unwarrantable. In the case supposed, in what manner is either court to render such a general judgment as to all the parties?

I have stated these difficulties because they are the very difficulties, which, in the farther progress of the cause here, if we could maintain jurisdiction over it, may, nay, must arise. I know not how they are to be overcome. Indeed, the only possible manner in which a removal by one defendant to this court could be sustained, either in an action of contract, or of tort, would be by considering such a removal as ending the suit as to all the other parties, and taking from the plaintiff his right to a joint action. There is certainly no authority for that; and I know no principle to justify it. My brother Washington, in *Beardsley v. Torry* (Case No. 1190), held that a suit, if removable at all, must be entirely removed. It can not be severed, and a part only removed. "Not only," said he, "would such a doctrine be attended with absurdity and inconvenience; but it would be repugnant to the language and to the clear meaning of the twelfth section" of the act of congress. Notwithstanding the criticism bestowed at the bar upon this case, it appears to me directly in point. And that most learned and painstaking judge added (what is equally in point in this suit) that there was another reason why the circuit court could not take cognizance of the cause, as a removal cause, which was, "that S. (one of the defendants) did not join in the petition for the removal; and it is not competent for one defendant to remove the cause without the consent of all the defendants."

But it has been said, that if one defendant alone can not, under the act of congress, remove a suit into the circuit court, the constitutional provision may be evaded at pleasure, as to suits between citizens of different states being cognizable in the courts of the United States; for persons may fraudulently be made nominal defendants for the very purpose of preventing a removal of the suit. If such a case should arise (for in

this case it is not pretended) of a fraudulent joinder of parties for such a purpose, it would deserve consideration, whether the jurisdiction of this court could be so evaded; and whether, in furtherance of justice, under such circumstances, the injured defendant might not have some remedy at law or in equity (by way of injunction or otherwise) to reach the mischief. But if the mischief in such a case should be admitted to be irremediable, that is a consideration properly addressing itself to the national legislature to provide suitable means of redress for it. It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.

Construing the Act of March 2, 1867, 14 Stat. L. 558, providing for removal in certain cases, see *Gaines v. Fuentes*, 92 U. S. 10, 19.

WARD v. ARREDONDO.

Reported in Fed. Case 17, 148 (1 Paine, 410).
(1825.)

THOMPSON, Circuit Justice: This is a motion, that the appearance of Fernando Arredondo, one of the defendants, be entered in this court, for the purpose of removing the cause from the state court, where it was commenced, pursuant to the act of congress in such case made and provided. A brief statement of the situation of the cause is necessary to a right understanding of the questions that are presented for consideration. A bill in equity was filed by Ward, a citizen of the state of New York, against the Arredondos, who are aliens, and Thomas, who is a citizen of the state of New York, for the specific performance of a contract between the Arredondos and Ward, for the conveyance by them of a certain tract of land in Florida, under and by virtue of a contract which had been entered into between the parties, for the sale and purchase of the land in question, a deed for which had been duly executed by the Arredondos, and sent to Thomas for delivery, with certain instructions which will be noticed hereafter. The main object of the bill, was to compel a delivery of the deed to Ward, and to restrain Thomas from returning the same to the Arredondos, until the merits of the suit between them and Ward should be determined. Thomas appeared in the state court, and answered the bill.

One of the Arredondos has heretofore appeared in the state court, and petitioned for a removal of the cause into this court, and his appearance has been duly entered here. We lay out of view the objection urged on the argument, that the cause was not in the state circuit court when his appearance was entered, and the petition to remove the cause into this court was filed. It is alleged that the cause had been removed from that court into the court of chancery by appeal, and had not been remitted to the state circuit court, at the time the appearance was entered. We assume for the purpose of the present motion, that the cause was regularly in the state circuit court, and that the appearance of one of the Arredondos was duly entered there.

Under this state of the case, the questions presented for consideration, are: 1st. Whether, as Ward the complainant and Thomas one of the defendants, are both citizens of New York, the cause can be removed into this court. 2dly. As to the practice of removing causes from the state courts, when there are several defendants, and their appearance in the state court is entered at different times.

It is a well-settled rule, and indeed has not been denied by the defendants' counsel, that when the jurisdiction of this court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction can not be entertained. This is the general rule; the exceptions will be noticed hereafter. 3 Cranch (7 U. S.) 267. And under this rule, this court, *prima facie*, can not take jurisdiction of this cause; for Thomas, one of the defendants, is a citizen of the same state with the complainant. It is very evident that Ward could not originally have filed his bill in this court, against Thomas as one of the defendants, and it would seem to follow as a necessary consequence, that if jurisdiction could not be entertained directly, it ought not to be acquired indirectly. But it is said that Thomas is only a nominal party, and that the jurisdiction of this court can not be taken away in such case. If the fact be so, that he is a mere nominal party, there is no doubt it would not deprive this court of jurisdiction. It has been so decided by the supreme court in the case of *Brown v. Strode*, 5 Cranch (9 U. S.) 303, and in *Wormly v. Wormly*, 8

Wheat. (21 U. S.) 451. In such cases the jurisdiction of the court, depending upon the question whether the individual who is *prima facie*, incompetent to appear in the courts of the United States, is a real and substantial, or only a nominal party, this court must of necessity go so far into the merits of the case as to enable it to decide that question. Is Thomas then a nominal party only, in the sense in which that rule is to be understood? And we think he is not; but that he is a real, and an indispensable party to the decision and final determination of the merits of this case. From the allegations in the bill, and the answers of Thomas, it appears that the deed for the land in question has been executed by the Arredondos, and placed in the hands of Thomas for delivery to Ward, upon his paying a sum of money, the amount not ascertained with certainty. The allegation in the bill is, that five thousand dollars, which was more than the balance due, had been tendered to Thomas, and the deed demanded. The answer of Thomas admits, that he was authorized by the Arredondos to deliver the deed upon the receipt of such sum (in addition to a balance of principal of about five thousand dollars, remaining due upon the contract) as he (Thomas) might think proper. He also admits the tender of the five thousand dollars; but that he demanded fifteen thousand dollars before he would deliver the deed. Thomas then, according to his admissions, held this deed in trust, with a discretionary power to deliver it upon the payment of such sum as he should demand over and above five thousand dollars. The five thousand dollars was duly tendered, but he chose to demand ten thousand dollars more. He assumed then either arbitrarily or upon his construction of the contract, to claim ten thousand dollars more than was admitted by the complainant to be due, and of course made himself, to a certain extent, a party to the merits of the question. And it was competent to the court of chancery to say, whether, upon examination, he had abused his trust, and demanded that, for which there was no color, or to have decreed a delivery of the deed upon payment of such sum as should be found justly due, or to have dismissed the bill, according as it should find the merits of the case on examination. But he was an essential party to enable the complainant to obtain the relief sought, viz.: a title for the land. Thomas in his answer admits,

that Ward had paid upwards of thirty-five thousand dollars upon the contract. Under the circumstances of this case, the very essence of the relief is to be obtained only by a decree against Thomas, to deliver the deed.

In the case of *Wormly v. Wormly* (*supra*), the criterion by which it was determined whether a party was nominal or not, was whether a decree against him was sought. The court said it would not suffer its jurisdiction to be ousted by the mere joinder or nonjoinder of formal parties, but will proceed without them, and decide upon the merits of the case between the parties who have the real interest before it, whenever it can be done without prejudice to the rights of others. Thomas, we think, is not a mere formal party, but that a decree against him is essential to the relief claimed, if the complainant is entitled to it. Whether he is or not, is a question upon which we give no opinion.

This view of the case leads to a denial of the motion, and remanding the cause to the state court, and renders it unnecessary to express any opinion upon the second point. But as it is in a great measure a question of practice, and may be applicable to other cases, it may not be amiss to express our present impressions on the point. The state court had unquestionably jurisdiction of the cause. The complainant had, therefore, a right to go there for relief, and indeed in this case he must have commenced his suit in the state court. But the present question is, supposing the Arredondos, both aliens, were the only defendants, one having appeared in the state court, and the other not; can the one who has appeared remove the cause and give the circuit court of the United States jurisdiction upon the merits? And we are inclined to think he can not. We would be understood, however, as confining this rule to cases where from the subject-matter of the suit the judgment or decree must be joint. There may be cases in equity where the several parties represent distinct interests, so that separate decrees may be made, where possibly some of the parties may take the cause into the circuit court, and others remain in the state court; but it ought even in such cases to be a very strong and palpable case of separate and distinct interests to sanction such a course. There is nothing disclosed in this case to bring it within any such rule. The interest is fairly to be presumed joint; and the

cause must come entire or not at all into this court, before the merits can be decided. Can then one of the alien defendants compel his codefendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we can not discover any satisfactory ground upon which such a doctrine can be sustained. The Judiciary Act considers the removal of the cause as the voluntary act of the party, and on his petition. By the word "party," as here used, must necessarily be understood the defendant, embracing all the individuals, be they more or less, constituting such party.

This application to remove the cause must be made at the time of entering the appearance in the state court. But there is nothing that makes it necessary, that such application should be made by all the defendants at the same time. This court is not possessed of the cause so as to proceed therein until all the defendants come here. But when the appearance in the state court shall be at different times by different defendants, there can be no objection to their appearance being entered in this court at different times; and indeed such a construction of the act is indispensable, as the application for the removal must be made on entering the appearance in the state court; and when the defendants are numerous, they may in suits, both at law and in equity, be brought into the state court at different times; and that court can not cause the appearance then to be entered *nunc pro tunc*, so as to entertain the motion to remove the cause, after all the defendants are brought into court. *Gibson v. Johnson* (Case No. 5397). But if all the defendants should not petition to have the cause removed into this court, so as to enable it to proceed, the cause may be remanded to the state court, so as to give it possession of the whole case, 4 Cranch (8 U. S.), 421. An original appearance of some of the defendants, can not be entered in this court. The cause having been regularly commenced in the state court, can not be removed therefrom except in the mode prescribed by the act of congress; the appearance must first be entered in the state court, and the security then given, to enter the appearance in this court; and then the state court is prohibited from proceeding any further in the cause. But until then it may proceed, and the effect might be in some cases, that proceedings would be going on at the same time,

in the same cause, in both courts. And this court is not authorized to take cognizance of the cause, unless removed in the manner pointed out by the act.

HALL v. GREAT NORTHERN RAILWAY.

Reported in 197 Fed. R. 488.

(1912.)

BOURQUIN, District Judge: This is a motion to remand. Plaintiffs are citizens and residents of Canada, and defendant is a citizen and resident of Minnesota, a corporation and common carrier owning and operating a railway in and through the county of Montana wherein the suit was commenced.

Plaintiffs contend that against their objections this court has no jurisdiction on removal, citing *Mahopoulus v. Railway Co.* (C. C.) 167 Fed. 169; *Kamenicky v. Printing Co.* (C. C.) 188 Fed. 400; *Sagara v. Railway Co.* (C. C.) 189 Fed. 222. Defendant contends to the contrary, citing *Barlow v. Railway Co.* (C. C.) 164 Fed. 765; *Decker, Jr., & Co. v. Railway Co.* (C. C.) 189 Fed. 224; *Bogue v. Railway Co.* (C. C.) 193 Fed. 728. The issue is one of venue, process, and objections to jurisdiction based thereon.

(1) While aliens are not within that provision of the statutes which prohibits bringing suit in any federal court save that in the district whereof defendant is an inhabitant, so far as suits against aliens are concerned, they are within it so far as suits by aliens are concerned. That is, an alien may be sued wherever valid service of process may be made on him, but he can sue a citizen only in the district whereof the latter is an inhabitant.

(2) The statutes also provide that, when jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. This does not apply to aliens. *In re Hohorst*, 150 U. S. 660, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Railway Co. v. Gonzales*, 151 U. S. 507, 14 Sup. Ct. 401, 38 L. Ed. 248. In any such case objections to suit in the wrong district may be waived by defendant, or by plaintiff on removal.

(3) By reason of the statutes aforesaid, it is settled law that a case that could not be brought and maintained in a federal court against defendant's objections, can not be removed and maintained therein against plaintiff's objections. *In re Moore*, 209 U. S. 506, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164.

(4) Neither party hereto being citizens or residents of Montana, and plaintiffs objecting to this court's jurisdiction over them, it is clear in view of the law aforesaid that the case can not be maintained herein. But defendant contends that to this rule of law there is an exception when an alien or non-resident citizen brings suit in a state court against a nonresident citizen, and in support thereof relies upon the reasoning and conclusions of the cases aforesaid cited by it. Said cases are "all fours" with this at bar (save that *Bogue v. Railway Co.*, *supra*, involves merely diverse citizenship and not alienage), as are those cited by plaintiffs, but with all due respect for the learned judges that determined the former I dissent therefrom, and concur with those who determined the latter. The argument in behalf of the exception claimed to said rule of law is, so far as alienage is concerned, that otherwise an alien is favored with a choice, denied to a citizen, of a forum, and that but for said exception a citizen is precluded from removal of any suit brought by an alien against him in a state court anywhere. To this it may be answered that like choice denied to defendants of a forum is the right of citizen plaintiffs in some causes within federal jurisdiction by reason of diverse citizenship, that congress saw no necessity for removal in cases like this at bar and so made no provision therefor in the removal act, and that there is no right of removal save where given by said act. The exception claimed is not to be found in the removal act, and all attempts to establish it by construction are due to the supposed exigencies of the situation created by alien or nonresident litigants.

(5) The reason and object of the removal acts in conferring upon the federal courts "jurisdiction of controversies between citizens of different states of the Union, or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides." *Steamship Co. v. Kane*, 170 U. S.

111, 18 Sup. Ct. 526, 42 L. Ed. 964. This reason and object fail in cases like this at bar, and so their removal is not provided for. Congress doubtless believed that any state court to which an alien is willing to submit his cause against a citizen ought to be fully impartial and would suffice for the purposes of justice between them. The removal act itself furnishes trenchant argument against the exception claimed, in that in Judicial Code, Section 34 (Act March 3, 1911, c. 231, 36 Stat. 1098 [U. S. Comp. St. Sup. 1911, p. 145]), Section 644, R. S. (U. S. Comp. St. 1901, p. 523) it expressly provides for the removal to the federal court of suits brought in state courts by aliens against certain nonresident citizens, not including nonresident defendants like the defendant in the case at bar, thus impliedly excluding removal in all other cases wherein alienage is material to federal jurisdiction and so excluding the case at bar. *Expressio unius*, etc. Of course, said section contemplates only certain cases within federal general jurisdiction by reason of alienage, for all other cases within said general jurisdiction, save those removable for diversity of state citizenship, when removable, are removable under like conditions by both aliens and citizens. It will be observed that, if the exception claimed exists, the cases expressly provided for in Section 34 as well as all cases like this at bar would be removable by virtue of said exception, and without the aid of said Section 34, which latter then would be unnecessary and more superfluous than a fifth wheel to a wagon. It is because none other of the removal statutes did provide for removal to the federal courts of any suits brought in state courts by aliens against nonresident citizens that congress in Section 34 provided therefor in such cases wherein the defendants are officers of the United States, doubtless believing it in furtherance of an impartial trial and necessary in such cases only.

In addition to the foregoing and in more particular and brief reference to the cases in support of the exception claimed, heretofore cited, *Bogue v. Railway Co.*, *supra*, would seem clearly inconsistent with the decision of the supreme court in *Railway Co. v. Gonzales*, *supra*, and to which it makes no reference; for, while the former holds that a corporation of one state may be a resident within another and so suable in a federal

court therein, by a nonresident citizen (and by an alien if the principle be sound), in the latter the supreme court decided that for purposes of suit by an alien (and equally so by a citizen) the residence, habitat, and citizenship of a corporation are solely in the state of its incorporation, and in the federal district thereof wherein are its principal offices. *Decker, Jr., & Co. v. Railway Co.*, *supra*, seems to go upon the theory that but for the exception the alien has a choice, denied to citizen, of a forum. The reason and object of removal deprives this theory of weight. *Barlow v. Railway Co.*, *supra*, maintains the exception on the ground that, when an alien sues in a state court, he voluntarily subjects himself to the process of the federal court on removal; that is, in advance and in the state court he waives objections to the jurisdiction of the federal court on removal. But one can not be held to waive an objection to jurisdiction over his person other than by appearing generally in the court claiming such jurisdiction, or therein giving some express consent or stipulation, and, it is believed, never in advance of the institution of proceedings in the court the jurisdiction of which is involved. For the foregoing reasons, this court has no jurisdiction over the plaintiffs, and the motion to remand is granted, with costs to plaintiffs.

Removal by railway defendant. See Judicial Code, Section 28.

In *Bogue v. Railway*, 193 Fed. Rep. 728, suit was brought in state court in Iowa, by plaintiff, of Nebraska, against defendant railway, incorporated in Illinois, having line of road through the county where suit brought; attempted removal solely on ground of diversity of citizenship; motion to remand, denied. The court reasons that the railroad here, by operating line through Iowa, had residence there, and so if plaintiff had brought suit originally in United States circuit court that court would have had jurisdiction. So the court finds: (1) Original jurisdiction in circuit court of the United States because of residence in Iowa (having line of road and agent, and having consented upon coming into state to be sued there). (2) Right to remove because citizenship is in Illinois, where incorporated; but this argument is assailed and repudiated in *Baldwin v. Pacific Light & Power Co.*, 199 Fed. 291, since as there stated, "a corporation can not be a nonresident for purpose of removal and a resident for purpose of original jurisdiction."

In *Stone v. Railway*, 195 Fed. Rep. 832, plaintiff of Kansas, defendant railway of Illinois, suit brought in state court of Missouri; removal by railway; motion to remand on ground that circuit court of United States had not original cognizance thereof. The facts and the situation here are

practically identical with those in *Bogue v. Railway Co.*, 193 Fed. 728, in the same circuit, but the court in a searching and well-reasoned opinion holds that the case must be remanded, although the court's attention was directed to that case. The court says the rule as to removal is exactly the same when a railway corporation is defendant as when any other corporation, or an individual is involved, and when any nonresident defendant has removed he has invited the nonresident plaintiff to submit to the federal jurisdiction, which invitation the plaintiff may properly decline, and *does so by motion to remand*, on the ground that "*non in hæc fœdera veni*." The court says that selecting a state court is not agreeing to a federal court.

Smellie v. Southern Pacific Ry. Co., 197 Fed. 641, holds that an alien plaintiff can not object to removal by a nonresident defendant.

In *Sewing Machine Companies Case*, 18 Wall. 553 (1873), it was held that under the Act of March 2, 1867, a suit is not removable at the instance of two nonresident defendants where the remaining defendant and the plaintiff are citizens of the state where the suit is brought.

Plurality of defendants:—Where A, of New York, sues B and C, aliens, and D, of Georgia, in a state court of South Carolina, the case may be removed upon petition of all the defendants. *Baker v. Pinkham*, 211 Fed. 728.

Waiver of right as to venue, see note to *Memphis Sav. Bank v. Houchens*, 52 C. C. A., p. 192, and *McPhee & McGinnity Co. v. Union Pac. Ry. Co.*, 87 C. C. A. 634.

In *Empire Mining Co. v. Propeller Towboat Co.*, 108 Fed. 900 (1901), one plaintiff was a citizen of South Carolina, the other of Virginia, and the defendant was a citizen of Georgia, the suit being brought in a state court of South Carolina; upon the question of removability, the court held that defendant had waived his privilege of objecting to the jurisdiction of the federal court by removing the case thereto.

Restrictive effect of removal statute of 1888 pointed out, in reference to Statutes of 1789 and 1875, in *Mex. Natl. Railroad v. Davidson*, 157 U. S. 201; many cases agree that the jurisdiction of the federal courts is thereby purposely limited.

(b) Federal question.

N. O. R. R. v. MISSISSIPPI.

Reported in 102 U. S. 135.

(1880.)

MR. JUSTICE HARLAN delivered the opinion of the court: The plaintiff in error, defendant below, filed a petition in the state court of original jurisdiction for the removal of this suit into the circuit court of the United States for the southern district of Mississippi. The petition was accompanied by a bond, with

good and sufficient surety, conditioned as required by the statute. The application for removal was denied, and the court, against the protest of the company, proceeded with the trial of the suit. A demurrer to the answer was sustained, and judgment was entered in behalf of the state. Upon a writ of error, sued out by the company, the supreme court of Mississippi gave its sanction to the action of the inferior court upon the petition for removal, and affirmed, in all respects, its judgment upon the merits.

The first assignment of error relates to the action of the state court in proceeding with the trial after the filing of the petition and bond for removal of the suit. If the suit was one which the company was entitled, under the statute, to have removed into the circuit court of the United States, then all that occurred in the state court, after the filing of the petition and bond, was in the face of the act of congress. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Insurance Company v. Dunn*, 19 Wall. 214. Its duty, by the express command of the statute, was, the suit being removable, to accept the petition and bond, and proceed no further.

Among the cases to which the national constitution extends the judicial power of the United States are those arising under the constitution or laws of the Union. The first section of the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States, and regulating the removal of causes from state courts, invests such circuit courts with original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and "arising under the constitution or laws of the United States." Under the second section of that act either party to a suit of the character just described may remove it into the circuit court of the United States for the proper district. The only inquiry, therefore, upon this branch of the case is, whether the present suit, looking to its nature and object as disclosed by the record, is, in the sense of the constitution, or within the meaning of the Act of 1875, one "arising under the constitution or laws of the United States."

The action was commenced by a petition filed, in behalf of the state, against the New Orleans, Mobile and Chattanooga Railroad Company (now known as the New Orleans, Mobile and Texas Railroad Company), a corporation created in the year 1866, under the laws of Alabama, and by an act of the legislature of Mississippi passed February 7, 1867, recognized and approved as a body politic and corporate in that state, with authority to exercise therein the rights, powers, privileges, and franchises granted to it by the state of Alabama.

The object of the action was to obtain a peremptory writ of mandamus, requiring the company to remove a stationary bridge which it had erected across Pearl river, on the line between Louisiana and Mississippi, and construct and maintain, in the central portion of the channel of that river, where the railroad crosses, a drawbridge which, when open, will give a clear space, for the passage of vessels, of not less than sixty feet in width, and provide, after its construction, for the opening of the drawbridge, without unnecessary delay, for any and all vessels seeking to pass through it. * * * (The court here sets forth the claims of the parties and proceeds:)

From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the state rests, in part, upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the Act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl river, invokes the protection of the Act of Congress passed March 2, 1868. While the case raises questions which may involve the construction of state enactments, and also, perhaps, general principles of law, not necessarily connected with any federal question, the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of congress. If it be insisted that the claim of the state, as set out in its petition, might, possibly, be determined by reference alone to state enactments, and without any construction of the Act of 1817, the provisions of which are invoked by the state in

support of its application for mandamus, the important, and, so far as the defense is concerned, the fundamental, question would still remain, as to the construction of the Act of Congress of March 2, 1868. That act, the company contends, protects the present stationary bridge against all interference whatever, upon the part either of the state or of the courts. In other words, should the court be of opinion that the law is for the state, if the rights of parties were tested simply by the statutes of Alabama and Mississippi, it could not evade, but must meet and determine, the question, distinctly raised by the answer, as to the operation and effect of the Act of Congress of 1868.

Is it not, then, plainly a case which, in the sense of the constitution, and of the statute of 1875, arises under the laws of the United States?

If regard be had to the former adjudications of this court, this question must be answered in the affirmative.

It is settled law, as established by well-considered decisions of this court, pronounced upon full argument and after mature deliberation, notably in *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. Bank of the United States*, 9 Id. 738; *Mayor v. Cooper*, 6 Wall. 247; *Gold-Washing & Water Company v. Keyes*, 96 U. S. 199; and *Tennessee v. Davis*, 100 U. S. 257.

That while the eleventh amendment of the national constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, such power is extended by the constitution to suits commenced or prosecuted by a state against an individual, in which the latter demands nothing from the former, but only seeks the protection of the constitution and laws of the United States against the claim or demand of the state.

That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either:

That cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim, or protection, or

defense of the party, in whole or in part, by whom they are asserted;

That, except in the cases of which this court is given, by the constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct; and, lastly,

That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

These propositions, now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that, whether we look to the federal question raised by the state in its original petition, or to the federal question raised by the company in its answer, the inferior state court erred, as well in not accepting the petition and bond for the removal of the suit to the circuit court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

In view of our decisions in *Insurance Company v. Dunn* (19 Wall. 214), in *Removal Cases* (100 U. S. 457), and in other cases, it is scarcely necessary to say that the railroad company did not lose its right to raise this question of jurisdiction by contesting the case, upon the merits, in the state courts after its application for the removal of the suit had been disregarded. It remains in the state court under protest as to the right of that court to proceed further in the suit, and there is nothing in the record to show that it waived its right to have the case removed to the federal court, and consented to proceed in the state court, as if there had been no petition and bond for the removal.

The judgment of the supreme court of Mississippi will, therefore, be reversed, and the cause remanded for such orders as may be consistent with this opinion, and with directions that

the court of original jurisdiction be required to set aside all judgments and orders made in this suit after the presentation of the petition and bond for its removal into the circuit court of the United States, and proceed no further in the suit; and it is *so ordered*.

POSTAL TELEGRAPH CABLE COMPANY v. ALABAMA.

Reported in 155 U. S. 482.

(1894.)

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court: * * * The grounds upon which the present suit was removed from a court of the state of Alabama into the circuit court of the United States were that the controversy therein arose under the constitution and laws of the United States, and that it was wholly between citizens of different states.

But the suit was one brought by the state to recover taxes and penalties imposed by its own revenue laws, the jurisdiction over which belongs to its own tribunals, except so far as congress, in order to secure the supremacy of the national constitution and laws, has provided for a removal into the courts of the United States. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290; *Huntington v. Attrill*, 146 U. S. 657, 672. And the complaint by which the suit was begun did not mention the constitution or any law of the United States, or claim any right under either.

A state is not a citizen. And, under the Judiciary Act of the United States, it is well settled that a suit between a state and a citizen or a corporation or another state is not between citizens of different states; and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws or treaties of the United States. *Ames v. Kansas*, 111 U. S. 449; *Stone v. South Carolina*, 117 U. S. 430; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473.

It is equally well settled that under the provisions above referred to, of the existing act of congress, no suit can be removed by a defendant from a state court into the circuit court of the United States, as one arising under the constitution, laws or treaties of the United States, unless the fact that it so arises appears by the plaintiff's statement of his own claim;

and that a deficiency in his statement, in this respect, can not be supplied by allegations in the petition for removal, or in subsequent pleadings in the case. *Tennessee v. Bank of Commerce*, 152 U. S. 454; *Chappel v. Waterworth*, ante, 102.

The conclusion is inevitable, that the judgment of the circuit court of the United States must be reversed, and the case remanded to that court, with directions to remand it to the state court; and that, the case having been wrongfully removed into the circuit court of the United States by the Postal Telegraph Cable Company, that company must pay the costs in that court, as well as in this court. *Tennessee v. Bank of Commerce*, above cited; *Hanrick v. Hanrick*, 153 U. S. 192. *Judgment reversed accordingly.*

(c) Separable controversy.

ST. LOUIS & SAN FRANCISCO RY. CO. v. WILSON.

Reported in 114 U. S. 60.

(1885.)

THIS was an appeal from an order of the circuit court of the United States remanding a suit to the circuit court of the city of St. Louis, Missouri, from which it had been removed upon a petition filed under the Act of March 3, 1875, ch. 137, 18 Stat. 470. The suit was in equity and brought by William C. Wilson, the appellee, a citizen of Missouri, against the St. Louis and San Francisco Railway Company, a Missouri corporation, and Jesse Seligman, and James Seligman, citizens of New York, to compel the company to transfer to Wilson on its books certain shares of its capital stock standing in the name of the Seligmans, and to issue to him certificates therefor. The petition stated that Wilson purchased the stock at a sale under an execution issued upon a judgment in his favor and against the Seligmans, and that on the 19th of December, 1883, he exhibited to the company his certificate of purchase, and demanded that the company cause his name "to be entered on the stock books of said corporation as the owner of said shares of said capital stock, * * * and further duly notified said corporation to pay to him all dividends that might thereafter be declared and payable to and on said stock;" but

that the company refused to do so. The prayer was for a transfer of the stock, the cancellation of the certificates to the Seligmans, the issue of new certificates and payment of dividends to Wilson, and an injunction prohibiting the Seligmans from acting as stockholders.

The company and the Seligmans filed separate answers, but setting up substantially the same defense, to wit, that the stock, though standing in the name of the Seligmans, did not in fact belong to them when the execution was levied, or when the sale to Wilson was made, because they had long before that time sold and transferred their certificates to other parties for value, who were the real holders and owners of the stock, though not transferred to them on the books. The Seligmans in their answer denied the validity of the judgment against them for the reason that it was rendered in a suit to which they were not parties. The petition for removal was presented by the Seligmans alone, and, after stating the citizenship of the parties, proceeded as follows: "That there is in said suit a controversy wholly between citizens of different states, which can be fully determined as between them without the presence of the defendant, the St. Louis and San Francisco Railroad. That there is in said suit a separate controversy wholly between said plaintiff and your petitioners, citizens of different states as aforesaid, which can be fully determined as between them, and your petitioners are actually interested in such controversy. That the controversy in said suit between plaintiff and your petitioners, as made by the pleadings, is wholly distinct and separate from that between the plaintiff and the St. Louis and San Francisco Railway Company."

Upon this petition the state court removed the suit, but the circuit court of the United States remanded it. To reverse this order of the United States court, the appeal was taken.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: After reciting the facts as above stated, he continued: There is but one controversy in this case, and that is as to the duty of the railroad company to transfer to Wilson the stock standing in the name of the Seligmans on its books and to issue new certificates therefor. Upon the one side of that controversy is the plaintiff, a citizen of Missouri, and on the

other the railroad company, a Missouri corporation. The sole purpose of the suit is to establish the duty and enforce its performance. This can not be done without the presence of the company, for it is upon the company itself that the decree must operate. The Seligmans are made parties only in aid of the principal relief which is asked. As the stock stands in their names on the books, the company may well claim a judicial finding in the cause which shall bind them, if upon the final hearing a transfer is ordered. The suit, therefore, is in truth and in form against both the company and the Seligmans on a single cause of action, and can not be removed unless the separate answer of the Seligmans introduces a separate controversy. This we have held in *Louisville & Nashville Railroad Co. v. Ide*, just decided, is not necessarily the effect of separate issues under separate defenses to the same action. No relief whatever can be granted unless it is found to be the duty of the company to transfer the stock, and as to that controversy the company is an indispensable party. *Central Railroad Company of New Jersey v. Mills*, 113 U. S. 249; *Thayer v. Life Association*, 112 U. S. 717.

The order remanding the cause is *affirmed*.

LOUISVILLE & NASHVILLE RAILROAD CO. v. IDE.

Reported in 114 U. S. 52.

(1885.)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: After stating the facts as above recited, he continued: The petition for removal was filed under the last clause of Section 2 of the Act of 1875, 18 Stat. 471, which is as follows:

“And when in any suit * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district.”

As we have already said at this term in *Ayres v. Wiswall*, 112 U. S. 187, 192, “the rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action, on which a separate and

distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, the citizens of different states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Hyde v. Ruble*, 104 U. S. 407; *Frazer v. Jennison*, 106 U. S. 191.

In the present case all the defendants are sued jointly and as joint contractors. There is more than one contract set out in the complaint, and there is therefore more than one cause of action embraced in the suit, but all the contracts are alleged to be joint and binding on all the defendants, jointly and in the same right. There is no pretense of a separate cause of action in favor of the plaintiff and against the Louisville and Nashville Company alone. The answer of the company treats the several causes of action alike and makes the same defense to all. For the purposes of the present inquiry the case stands as it would if the complaint contained but a single cause of action. The claim of right to a removal is based entirely on the fact that the Louisville and Nashville Company, the petitioning defendant, has presented a separate defense to the joint action by filing a separate answer tendering separate issues for trial. This, it has been frequently decided, is not enough to introduce a separate controversy into the suit within the meaning of the statute. *Hyde v. Ruble*, *supra*; *Ayres v. Wiswall*, *supra*. Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith v. Rines*, 2 Sumner, 348. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here

it is certain joint contracts entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible.

It is said, however, that by the New York Code of Civil Procedure, Section 1204, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants," and under this it has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable. The same rule undoubtedly prevails in many other states, but this does not make a joint contract several, nor divide a joint suit into separate parts. It may expedite the judicial proceedings and save costs, but it does not change the form of the controversy, that is to say, the case. The plaintiff can still sue to recover from all, though he may be able to succeed only as to a part.

The order remanding the case is *affirmed*.

ALABAMA SOUTHERN RAILWAY v. THOMPSON.

Reported in 200 U. S. 206.
(1906.)

MR. JUSTICE DAY delivered the opinion of the court: This case is here on a certificate from the United States circuit court of appeals for the sixth circuit. The certificate states the facts and propounds the questions as follows:

"This was an action in tort brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

"The suit was started in a circuit court of the state of Tennessee and a declaration was there filed.

"The plaintiff was a citizen of Tennessee.

"The defendants were the Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the state of Tennessee.

“The case was then removed into the court below upon petition of the railroad company alone, upon the ground that a separable controversy, involving more than two thousand dollars, exclusive of interest and costs, existed between the petition and the plaintiff, as to whom diversity of citizenship existed, which could be tried out without the presence of either of the individual codefendants of petitioner.

“A motion to remand to the state court because no removable separate controversy appeared was overruled.

“Thereupon an issue was made and the case heard by court and jury, and a judgment rendered in favor of the plaintiff and against the railroad company alone.

“From this judgment the railroad company sued out this writ of error.

“Upon the hearing in this court the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

“That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully, and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer.

“Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defendants, who were servants of the railroad company, it is ordered that the foregoing statement be certified to the supreme court, and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record:

“1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor

and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

“2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds two thousand dollars, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?”

A question certified must be one the answer to which is to aid the court in determining a case before it. *Columbus Watch Co. v. Robbins*, 148 U. S. 266. And it is evident that the matter to be determined in the case pending, concerning which the opinion of this court is asked, is the removability of the case brought in the state court against the railroad company and the individual defendants. We shall answer the questions in that view.

The right to remove the controversy is founded upon Section 2 of the Act of March 3, 1887, as corrected August 13, 1888 (1 Sup. Rev. Stat. 611). It is therein provided, among other things, “And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States, for the proper district.”

The case was removed upon the theory that it contains a separable controversy between the nonresident railroad company and the plaintiff. The Removal Act of 1875, as amended in 1887, 1888, in the part quoted above as to separable controversies, has been the subject of frequent adjudication in this court. Independent of statute, there is much conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct di-

rectly caused the injury. In a leading case in this court, *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, many of the cases were reviewed by the chief justice who delivered the opinion, and it was shown that in a number of English and American cases it has been held that, as to third persons, the master is responsible for the negligence of his servant in a joint action against both, to recover damages for an injury. In the cases of *Warax v. Cincinnati, N. O. & T. P. Railroad Co.*, 72 Fed. Rep. 637, a case which has been much cited and sometimes followed in the federal courts, it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, when his responsibility arises wholly from the policy of the law, which requires that he shall be held liable for the acts of those he employs in the prosecution of his business. And it was held that the petition against the engineer and the company presented a case of misjoinder, and could be removed on the application of the nonresident company.

In the case of *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his plead-

ings. *Pirie v. Tvedt*, 115 U. S. 41, 43; *Sloane v. Anderson*, 117 U. S. 275; *Little v. Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville R. R. Co. v. Wangelin*, 132 U. S. 599; *Torrence v. Shedd*, 144 U. S. 527, 530; *Connell v. Smiley*, 156 U. S. 335, 340.”

After thus stating the rule, the justice commented on the *Warax* case, *supra*, as a departure from the former ruling of the circuit court. And while the *Powers* case was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the federal court.

And in *Louisville & Nashville R. R. Co. v. Wangelin*, 132 U. S. 599, 601, the same eminent judge, speaking for the court, said:

“It has often been decided that an action brought in a state court against two jointly for a tort can not be removed by either of them into the circuit court of the United States, under the Act of March 3, 1875, c. 137, Section 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. 471; *Pirie v. Tvedt*, 115 U. S. 41; *Sloane v. Anderson*, 117 U. S. 275; *Plymouth Company v. Amador & Sacramento Co.*, 118 U. S. 264; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535.

“It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner—unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.” * * *

In the present case there is nothing in the questions propounded which suggests an attempt to commit a fraud upon the jurisdiction of the federal courts.

As shown in the opinion of the chief justice in the Carson case, *supra*, the cases are in difference as to whether a common law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

Does this become a separable controversy within the meaning of the act of congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case can not be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In *New Orleans v. Winter*, 1 Wheat. 91, it was held that a citizen of a territory could not sue in a federal court by joining with himself a citizen of another state. The opinion was delivered by Chief Justice Marshall, who said (p. 95): "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

It is urged with much earnestness by the learned counsel for the company that this view works a surrender of the right

of determination of federal rights in the federal courts, and deprives nonresident citizens of their rights to appeal to those tribunals. The decision of a state court, that such actions as the present might be joint at common law, would have no controlling effect in the federal courts in determining the question in causes properly before them. And the question here is not what is the rule of the federal courts in similar cases, but is, what controversies has congress made removable in the act under consideration? Congress has not said, whatever it might do, that controversies between citizens of different states shall be removable wherein it is sought, contrary to the law as administered in the federal courts, to hold the citizen of another state to joint liability in tort with a citizen of the state where the action is brought. The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.

The federal courts in some states hold a different rule as to the doctrine of fellow servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such difference. No more has congress given the right where the state permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the state court. All of the defendants not being nonresidents it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of congress.

We answer the first question: That for the purpose of determining the right of removal, the cause of action must be

deemed to be joint. The views herein expressed lead to an answer to the second question in the negative.

In this opinion we have taken no account of the peculiar statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the state of Tennessee.

BLAKE v. McKIM.

Reported in 103 U. S. 336.

(1880.)

MR. JUSTICE HARLAN delivered the opinion of the court: This action was commenced in one of the courts of Massachusetts, by a citizen of Massachusetts for the use of citizens of that state, against the executors of George Baty Blake, two of whom are citizens of Massachusetts and one a citizen of New York. It is upon a probate bond, executed by James M. Howe, as trustee under the will of Henry Todd, with two sureties, one of whom was the testator of the defendants. Its object is to recover from the estate of the deceased surety the sum of fifty thousand dollars for alleged breaches, upon the part of the trustee, of the bond sued on.

The executors filed a joint answer, which presented a common defense, and subsequently, in proper time, filed their joint petition for the removal of the case into the circuit court of the United States for the district of Massachusetts. The petition was dismissed by the state court. The transcript of the record was, nevertheless, filed in the circuit court. By the latter court the case, upon motion of plaintiff, was remanded to the state court. From that order this writ of error is prosecuted.

We are of opinion that the case, as made by the plaintiffs, is not one of which the circuit court of the United States can take jurisdiction.

In *Removal Cases* (100 U. S. 457) we had occasion to construe the first clause of the second section of the Act of March 3, 1875, c. 137, which declares that either party may remove to the circuit court for the proper district any suit of a civil nature, at law or in equity, pending in a state court, where

the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and in which there is "a controversy between citizens of different states." We held it to mean "that when the controversy, about which a suit in the state court is brought, is between citizens of one or more states on one side, and citizens of other states on the other side, either party in the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants;" that, upon arranging the parties on opposite sides of the real and substantial dispute, if it appears that those on the one side are all citizens of different states from those on the other, the suit may be removed—all those on the side desiring a removal uniting in the application therefor. In that case an Iowa corporation represented one side of the dispute, while the other was represented by citizens of Ohio and Pennsylvania. The controversy was as broad as the suit.

In *Barney v. Latham* (*supra*, p. 205), we held, construing the second clause of that section, that one or more of the plaintiffs or defendants, actually interested in a controversy wholly between citizens of different states, and which can be fully determined as between them, can remove from the state court the entire suit of which that separable controversy forms a part, provided it involves the amount prescribed as necessary to federal jurisdiction.

The executors of Blake—each of them having qualified and acted in the execution of the trust—were all indispensable parties to the suit. Gould, Pleadings, Section 73, c. 4; Dicey, Parties to Actions, 322; 1 Chitty, Pl. 52. They all appeared and submitted to the jurisdiction of the court. The present case is, therefore, one in which the suit embraces only one indivisible controversy. It is not wholly between citizens of different states, and fully determinable as between them, because some of the defendants are citizens of the same state with the plaintiffs.

The contention upon the part of counsel for the executors is, that the suit is removable upon their joint petition, under the first clause of that section. We are unable to concur in that view. There is, undoubtedly, some ground for such a

construction, but we are not satisfied that congress intended to enlarge the jurisdiction of the circuit courts to the extent which that construction would imply. The principal reason assigned in its support is, that the clause follows the words of the constitution, when giving jurisdiction to the circuit court of a suit in which there shall be "a controversy between citizens of different states"—language which, it is claimed, does not necessarily require that such controversy must be wholly between citizens of different states. But that consideration was pressed upon our attention in the case of the Sewing Machine Companies (18 Wall. 553), which arose under the Act of March 2, 1867, c. 196, 14 Stat. 558. That act authorizes the removal of a suit involving the requisite amount, "in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state," upon an affidavit by the latter, whether plaintiff or defendant, showing that he has reason to believe, and does believe, that, from prejudice or local influence, he would not be able to obtain justice in the state court. The argument there, by counsel of recognized learning and ability, was that a controversy between citizens of different states is none the less a controversy between citizens of different states because others are also parties to it; that to confine the federal jurisdiction to cases, wherein the controversy is between citizens of different states exclusively, is to interpolate into the constitution a word not placed there by those who ordained it, and materially limiting or controlling its express provisions. We declined to adopt that construction, and held that congress did not intend by the act to confer the right of removal where a citizen of a state, other than that in which the suit is brought, is united, as plaintiff or defendant in the controversy, with one who is a citizen of the latter state. The construction for which counsel for the plaintiffs in error here contend can not well be maintained without overruling the principles announced in that case.

It is to be presumed that congress, in enacting the statute of 1875, had in view as well the previous enactments, regulating the removal of causes from the state courts, as the decisions of this court upon them. If it was thereby intended to

invest the circuit courts with jurisdiction of all controversies between citizens of different states, although others might be indispensable parties thereto, such intention would have been expressed in more explicit language. We are not disposed to enlarge that jurisdiction by mere construction. We are of opinion that congress, in determining the jurisdiction of the circuit courts over controversies between citizens of different states, has not distinctly provided for the removal from a state court of a suit in which there is a controversy not wholly between citizens of different states, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal. is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked.

The judgment of the circuit court remanding the cause to the state court will, therefore, be affirmed, and it is *so ordered*.

HYDE v. RUBLE.

Reported in 104 U. S. 407.
(1881.)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: This was a suit begun by Ruble and Green, on the 6th of March, 1880, in a state court of Minnesota, upon an alleged contract of bailment made by the defendants as partners. The amount involved was a little more than five hundred dollars. The plaintiffs were citizens of Minnesota. Only one defendant, Rowell, was a citizen of that state. The business of the alleged partnership was carried on there. He filed a separate answer to the complaint, in which he denied the existence of any partnership between himself and the other defendants, and set up a full performance of the contract on his part. The other defendants joined in a separate answer for themselves, in which they denied any partnership with him, and any contract between themselves and the plaintiffs. They also denied generally all the allegations of the complaint.

On the 12th of April, 1880, after these answers were in, all the defendants, including Rowell, filed in the state court a petition for the removal of the suit to the circuit court of the United States for the district of Minnesota, on the ground

of the citizenship of the parties. At the next term of the circuit court the cause was remanded to the state court. This order was entered in the circuit court July 31, 1880, and a copy thereof filed in the state court on the 11th of August. On the 12th of January, 1881, at a term of the state court which began on the tenth of that month, another petition was filed, by all the defendants who were not citizens of Minnesota, for a removal of the suit, as to themselves, on the ground that there could be a final determination of the controversy, so far as it concerned them, without the presence of Rowell as a party. It is not contended that this petition was filed in time to effect a removal under the second clause of the second section of the Act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470); but the state court, under the second clause of Section 639 of the Revised Statutes, ordered a removal, so far as concerned the petitioning defendants, leaving the suit to proceed in that court as to Rowell. When the case was docketed in the circuit court under this second removal it was again remanded. To reverse these several orders of the circuit court this writ of error has been brought by the defendants.

This action is clearly one sounding in contract and not in tort. According to the allegations of the complaint the plaintiffs stored, at an agreed rate, their wheat with the defendants, who undertook to buy it and pay for it at the market price whenever the plaintiffs wanted to sell. The action is brought to recover what is alleged to be due on the price according to the terms of this contract. All the allegations of wrongful conversion are immaterial, and in no way change the character of the suit.

The suit, then, as it stands on the complaint, is in respect to a controversy between the parties as to the liability of the defendants on a single contract. One ground of defense is, that there was no partnership between the defendants, and that Rowell alone was bound by the contract that was made; and another, that the contract, by whomsoever made, had been fully performed. Clearly, then, under our rulings in *Removal Cases* (100 U. S. 457), and *Blake v. McKim* (103 *Id.* 336), the case was not removable under the first clause of the second section of the Act of 1875, because all the parties

on one side of the controversy were not citizens of different states from those on the other.

Neither do we think it was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy wholly between citizens of different states. To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other.

* * *

This suit presents but a single cause of action, that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy.

The suit is, therefore, governed by the principles applied in *Removal Cases* and *Blake v. McKim*, rather than those in *Barney v. Latham*, and was properly remanded. * * *

The order to remand is *affirmed*.

For separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 83; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 151; *Pollitz v. Wabash Ry. Co.*, 100 C. C. A. 1.

In *Barney v. Latham*, 103 U. S. 205 (1880), it was held that under the Act of March 3, 1875, where there is a separable controversy, upon removal the entire suit is carried over to the federal court; and if there is a party defendant citizen of the same state as plaintiff who is not an indispensable party, the suit may be removed and fully determined by the federal court; the state court in acting on the removal petition should regard the pleadings to ascertain the character of a party's interest.

Herein the court (J. Harlan) compares the various removal acts as follows:

"The act of September 24, 1789, c. 20, gives the right of removal to the defendant in any suit, instituted by a citizen of the state in which the suit is brought against a citizen of another state. According to the uniform decisions of this court it applied only to cases in which all the plaintiffs were citizens of the state in which the suit was brought, and all the defendants citizens of other states. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the federal court, leaving the remaining controversies in the state court for its determination. If the whole suit could not be removed, no part of it could be taken from the state court.

"Thus stood the law until the Act of July 27, 1866, c. 288, which (omitting such portions as have no bearing upon the present question) provides that:

"If in any suit * * * in any state court * * * by a citizen of the state in which the suit is brought against the citizen of another state, * * * a citizen of the state in which the suit is brought is or shall be a defendant, and if the suit, so far as relates * * * to the defendant who is a citizen of a state other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then and in every such case * * * the defendant who is a citizen of a state other than that in which the suit is brought may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court * * * copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing; * * * and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal, * * * and the said copies being entered as aforesaid in such court of the United States the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. * * * And such removal of the cause, as against the defendant petitioning therefor, into the United States court shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants, if he shall desire to do so.' 14 Stat. 306.

"This provision is explicit, and leaves no room to doubt what congress intended to accomplish. It proceeds, plainly, upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff, and that defendant who is a citizen of a state other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties: that in such a case, although the citizen of another state, under the particular mode of pleading adopted by the plaintiff, is made a codefendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separable controversy, be required to remain in the state court, and surrender his constitutional right to invoke the jurisdiction of the federal court; but that, at his election, at any time before the trial or final hearing, the cause, so far as it concerns him, might be removed into the federal court, leaving the plaintiff, if he so desires, to proceed, in the state court, against the other defendant or defendants. When there were several defendants to that

separable controversy, all of whom are citizens of states other than that in which the suit was brought, they could unite in claiming the removal of such controversy.

"Next came the Act of March 2, 1867, c. 196, which allows the citizen of the state other than that in which the suit was brought, whether plaintiff or defendant, upon the proper affidavit of prejudice or local influence, filed before the final hearing or trial of the suit, to remove the suit into the federal court, 14 Stat. 558. It was construed in *Case of the Sewing Machine Companies* (18 Wall. 553), as allowing a removal, upon such an affidavit, only where there is a common citizenship upon each side of the controversy raised by the suit; that is, all on one side being citizens of the state in which the suit is brought, while all on the other side are citizens of other states. In that case the plaintiff and one of the defendants were citizens of the state where the suit was brought, while two of the defendants were citizens of other states. It was ruled that whatever was the purpose of the Act of 1866 as to the particular cases therein provided for, congress did not intend, by the Act of 1867, to give to parties, who are citizens of states other than that in which the suit is brought, the right of removal upon the ground of prejudice or local influence when their codefendants or coplaintiffs, as the case might be, are citizens of the same state with some of the adverse parties. The court there evidently had in mind the case where the presence in the suit of all the parties, on the side seeking the removal, was essential in order that complete justice might be done, and not a suit in which there was a separable controversy, removable under the act of 1866.

"We come now to the Act of March 3, 1875, c. 137, the second section of which provides:

"That any suit of a civil nature at law or in equity now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there is a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States, for the proper district.' 18 Stat., pt. 3, p. 470.

"We had occasion to consider the meaning of the first clause of this section in *Removal Cases*, 100 U. S. 457. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other. And we held that if, in arranging the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different states from those on the other, the suit is removable under the first

clause of the second section of the Act of 1875, those upon the side seeking a removal uniting in the petition therefor. Whether that suit was not also removable under the second clause of that section we reserved for consideration until it became necessary to construe that part of the statute. The present case imposes that duty upon us."

LEWIS v. CINCINNATI, N. O. & T. P. Ry.

Reported in 192 Federal, 654.
(1910.)

SANFORD, District Judge: * * * (3) I am of the opinion, however, that in the present state of the record, the motion to remand can not be granted for the reason that the defendants' petition for removal is based not merely on the allegation of a separable controversy, but also on the ground that the defendant Smith was wrongfully joined as a defendant as a sham and device for the purpose of defeating the right of the railway company to remove the case to this court.

While it is well settled that in determining whether or not there is a separable controversy, "in the absence of a showing of fraudulent joinder," the cause of action must be taken as that which the plaintiff alleges it to be in his pleadings (200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, and cases cited), it is equally well settled that the averments of the declaration are not conclusive where the nonresident defendant, as a ground for removal, attacks the *bona fide* character of the averments of the declaration in reference to a local defendant and avers that such local defendant was joined as a party defendant in bad faith for the sole purpose of preventing a removal to this court, and that if upon inquiry by the federal court it is established to the satisfaction of the court that the averments in the declaration in reference to the local defendant were not made in good faith, but such defendant was joined for the sole purpose of defeating the removal to the federal court, the case will be held to be removable as though such local defendant had not been joined. *Louisville Ry. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Chesapeake Ry. Co. v. Dixon*, 179 U. S. 131, 138, 21 Sup. Ct. 67, 45 L. Ed. 121; *Alabama Ry. Co. v. Thompson*, 200 U. S. 206, 208, 26 Sup. Ct. 161, 50 L. Ed. 441; *Wecker v. Enameling Company*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430; *Dow v. Bradstreet*

Co. (C. C.), 46 Fed. 824, 828; *Warax v. Ry. Co. (C. C.)*, 72 Fed. 637, 641; *Hukill v. Railway Co. (C. C.)*, 72 Fed. 745, 754; *Landers v. Felton (C. C.)*, 73 Fed. 311; *Durkee v. Ry. Co. (C.C.)*, 81 Fed. 1.

(4) The answer filed by the plaintiff in the state court to the petition of removal in this case denied the allegations of the petition as to the wrongful joinder of Smith as a defendant.

The petition and answer thus raise an issue of fact which, it is well settled, is triable in this court. *Kansas City, F. S. & M. R. R. Co. v. Daughtry, supra*; *Wecker v. Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430. And while properly speaking, such answer should have been filed in this court, yet, without objection it may be so treated, or if objected to on that ground, it may be now refiled in this court.

(5) It results that until a determination of the issue of fact as to the wrongful joinder of the defendant Smith, final action can not be had on the plaintiff's motion to remand. If counsel agree, this issue of fact may be submitted to me upon affidavits and counter affidavits. *Wecker v. Enameling Co., supra*. Otherwise a day may be fixed for a hearing as to this issue, upon depositions and such oral testimony as may be presented at the hearing. If counsel can not agree as to such date, application may be made to me by either party, on due notice, to fix the date and place for such hearing.

C., R. I. & P. RY. v. SCHWYHART.

Reported in 227 U. S. 184.

(1913.)

MR. JUSTICE HOLMES delivered the opinion of the court: This is an action for personal injuries brought by Schwyhart against the railway company and those of its servants to whose immediate negligence the injuries were alleged to have been due. There was a verdict and judgment against the company and the defendant Barrett, but at the proper time a petition had been filed by the railway company for the removal of the action to the circuit court of the United States, and it now contends that all subsequent proceedings in the state courts were void. 145 Mo. App. 332

The declaration alleged that the plaintiff was employed by the company as hostler under Barrett as foreman; that it was his duty under Barrett's direction to uncouple the air brake and signal hose from between the ends of the cars on a specified train; that Barrett ordered him to do so, and that while he was between the cars, owing to their proceeding in an unusual manner that is stated, he was crushed; and further, that Barrett negligently ordered him into the dangerous situation without giving him warning of the danger, and by his order and presence assured the plaintiff that the work could be proceeded with safely, when by the exercise of ordinary care on Barrett's part the injury could have been avoided. After the petition for removal had been overruled the declaration was amended by inserting as to Barrett "although he well knew of plaintiff's danger and the unusual way by which the said Pullman car was to be switched."

The defendants other than the railway were residents of Missouri, and the petition for removal charged that they were joined for the sole and fraudulent purpose of preventing a removal. The grounds stated for the charge of fraudulent joinder were that the declaration disclosed no cause of action against those defendants, that the company and they were not jointly liable, and that they were persons of little or no property, while the company was fully able to pay. It will be sufficient to consider these grounds with reference to Barrett alone, the party that ultimately was held.

The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come. *Southern Ry. Co. v. Miller*, 217 U. S. 209, 215, 216. That court might hold that the declaration averred the plaintiff to have been led by Barrett into a trap that was set and snapped by the company, the latter being also liable for Barrett's share in the deed. Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right. *Chicago, Burlington & Quincy Ry. Co. v. Willard*, 220 U. S. 413, 427; *Illinois Central R. R.*

Co. v. Sheegog, 215 U. S. 308, 316. Hence the fact that the company is rich and Barrett poor does not affect the case.

The remaining justification for the charge of fraudulent intent is that no cause of action was stated against Barrett. That again is a question of state law, and that the plaintiff had such a cause of action in fact must be taken now to be established. The suggestion that mere nonfeasance is alleged is shown to be unfounded by the statement that we have made. It is true that the declaration was amended after the petition to remove had been denied, but the amendment if not unnecessary merely made the original cause of action more precise. On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the removal was denied. We are not to decide whether a flaw could be picked in the declaration on special demurrer. As the record stood Barrett was alleged negligently to have ordered the plaintiff into a dangerous place and by his conduct to have assured the plaintiff of safety, when if Barrett had used ordinary care the plaintiff need not have been hurt. To add that Barrett knew the specific source of the danger is merely to make plainer what evidently was meant before. *Judgment affirmed.*

CHICAGO, ROCK ISLAND & PACIFIC RY. v. DOWELL.

Reported in 229 U. S. 102.

(1913.)

MR. JUSTICE LURTON delivered the opinion of the court: This writ of error is sued out to review a judgment in a personal injury case because a petition to remove the case to the circuit court of the United States is said to have been erroneously denied.

The plaintiff, Albert M. Dowell, was a laborer in the employ of the railroad company, his work being to remove cinders and other debris from the tracks and yards of the company in the town of Liberal, Kansas. He was a resident and citizen of that state. The railroad company was a corporation of the states of Illinois and Iowa, but not of Kansas. The plaintiff while engaged in his proper work was run down

by an engine, upon which one Ed Johnson was the engineer in control, sustaining serious and permanent injuries.

To recover damages for his hurt, Dowell sued the railroad company and Johnson as jointly and severally liable. Johnson was alleged to be, and was in fact, a citizen of the state of Kansas. The railroad company in due time filed its petition and bond, to remove the action of the plaintiff against it to the circuit court of the United States, as presenting a separable controversy between the plaintiff and the corporation, which could be tried out and determined without the presence of its codefendant, Johnson. It also averred that Johnson was a man of no means, who had been joined as a defendant "for the sole and fraudulent purpose of defeating and preventing" the removal of the case by the nonresident railroad company to the circuit court of the United States. The application was denied and the suit was tried before a jury upon the issues made, which found for the plaintiff, against both of the defendants in the sum of fifteen thousand dollars, for which sum a judgment was entered. This judgment was later affirmed by the supreme court of the state. *Dowell v. Railroad Company*, 83 Kansas, 562. The only error assigned in this court is that the Kansas court erred in denying the application for removal. * * *

The claim of a right to have the cause removed to the circuit court of the United States was that the requisite diversity of citizenship existed as between the plaintiff and the petitioning railroad company, and that there existed as between them a separable controversy.

But if the plaintiff alleges that the concurrent negligence of the railroad company and its employee, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal because he might have sued them separately. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 601; *Powers v. C. & O. Railroad*, 169 U. S. 92; *Alabama & G. S. Railway v. Thompson*, 200 U. S. 206.

The petition of the plaintiff below was in substance that the defective character of the engine, the unfitness and incompetency of Johnson, the engineer controlling it, and his neg-

ligence and carelessness in needlessly running the engine over him without the exercise of proper care and caution, "concurrently and jointly contributed to the injuries of said plaintiff," who was at the time in the exercise of due care.

But it is said that some of the matters charged against Johnson consisted in acts of nonfeasance, and that an employer is not liable to a third person for conduct of that character.

Whether liability to a third person against a master may result from the servant's neglect of some duty owing to the employer alone, may be debatable. But we need not consider that question, since the plaintiff's declaration averred positive acts of negligence on the part of Johnson toward the plaintiff, namely, that while engaged in the company's service in the movement of the engine, he did not exercise that degree of care and skill which he was bound to exercise toward another servant engaged upon the tracks in the company's work. This was an act of misfeasance, for which he would be primarily liable, notwithstanding his contract relation to the employer and the liability of the latter for his negligent act under the Kansas statute abolishing the common law rule in respect of fellow servants.

The state court held that the allegations of the petition stated a case of concurring negligence of master and servant for which they might be jointly sued. That court, also, aside from any positive acts of negligence, such as the retention of an incompetent servant in the control and management of an unmanageable engine, must be regarded as necessarily holding that under the law and practice of the state, it was admissible to jointly sue the company with the servant for whose negligent act it was liable. *Southern Railway v. Miller*, 217 U. S. 209; *Alabama, etc., Ry. v. Thompson*, *supra*.

Whether there was a joint liability or not was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the state court to decide. *Railroad v. Thompson*, *supra*; *Illinois Central Railroad v. Sheegog*, 215 U. S. 308.

That the liability of the railroad company was statutory in so far as the common law fellow servant rule had been abol-

ished by statute, and the liability of Johnson dependent upon common law, was held by the Kansas court not to preclude a joinder. "It is enough," said the court below, "if the concurrent acts of negligence of each contributed to the injury inflicted upon the plaintiff." *Southern Railway v. Miller, supra*.

But the petition for removal averred that the sole reason in joining Johnson was for the fraudulent purpose of defeating the right of the railroad company to remove the action. It is further insisted that this averment presented a question of fact which could be tried only in the circuit court of the United States.

Allegations of fact, if controverted, arising upon such a petition, are triable, only in the court to which it is sought to be removed. *Illinois Central Railroad v. Sheegog, supra*. But if the petition was insufficient upon its face, the state court might for that reason deny it. It is well settled that the mere averment that a particular defendant had been joined for the fraudulent purpose of defeating the right of removal which would otherwise exist, is not in law sufficient. If the plaintiff had a right to elect whether he would join two tort-feasors, or sue them separately, his motive in joining them is not fraudulent, unless the mere epithet "fraudulent" is backed up by some other charge or statement of fact. *Illinois Central Railroad Co. v. Sheegog, supra*.

Neither did the allegation that the defendant Johnson was a man of small means and the responsibility of the railroad company unquestioned, serve to show any actual fraudulent purpose in joining him as a defendant. If the plaintiff had a cause of action which was joint and had elected to sue both tort-feasors in one action, his motive in doing so is of no importance. *Chicago, R. I. & P. Ry. v. Schwyhart*, 227 U. S. 184; *Deere, Wells & Co. v. Chicago, M. & St. P. Ry.*, 85 Fed. Rep. 876; *Welch v. Cincinnati, etc., Ry.*, 177 Fed. Rep. 760.

There was no error in denying the petition to remove. *Judgment affirmed*.

In *Wecker v. Enameling Co.*, 204 U. S. 176 (1906), it was held that where, on the hearing on motion to remand, the evidence establishes that the defendants were joined to defeat the federal jurisdiction, the suit will not be remanded.

In *Illinois Central Ry. Co. v. Sheegog*, 215 U. S. 308 (1909), it was held that an allegation in the petition for removal that defendants were joined for the purpose of preventing removal, is not a sufficient allegation that the joinder was fraudulent, and justifies the denial of the removal petition by the state court.

C. & O. RY. v. COCKRELL.

Reported in 232 U. S. 146.

(1914.)

(See below, p. . . .)

Further on removals, see *Cressler v. Maloney*, 210 Fed. R. 104 (separable controversy); and *Buchanan v. Ritter Lumber Co.*, 210 Fed. 144 (joinder of defendants).

FOSTER v. COOS BAY CO.

Reported in 185 Federal, 979.

(1911.)

BEAN, District Judge: The petition for removal does not charge that Harrington was made a defendant for the fraudulent purpose of depriving the federal court of jurisdiction, but "for the sole and single purpose of preventing the removal" to this court. No proof is offered by the petitioner in support of this averment, and it is therefore insufficient of itself to justify a removal. *Plymouth G. M. Co. v. Amador & S. C. Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232. The motive of the plaintiff in making Harrington a defendant is immaterial, in the absence of a showing of bad faith, unless it appears from the complaint that there is no joint right of action against him and his codefendant. The complaint charges a joint tort against both defendants. It is alleged that the several negligent acts complained of were the joint acts of both parties. They could, therefore, be sued either jointly or severally, and it is settled law that an action of tort brought in the state court by a resident plaintiff against a resident and a nonresident defendant who are concurrently or jointly liable, but which might have been brought against any one or more of them, instead of against all, contains no separable controversy authorizing its removal by the nonresidents to the circuit court of the United States, and this, notwithstanding the fact that the liability of the petitioning defendant is

based solely upon the doctrine of *respondeat superior*. *Alabama Great Southern Ry. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441. And, where a plaintiff in good faith prosecutes his action upon a joint cause of action and the complaint is the only pleading in the case, the test of removability is the action as stated in the complaint. If it is joint in character and there is no showing of bad faith, the question of joint liability is not to be tried in the removal proceeding, but the case must be held to be that which the plaintiff has stated in setting forth his cause of action. *Southern Ry. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *Thomas v. Gt. Northern*, 147 Fed. 83, 77 C. C. A. 255; *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; 4 Am. & Eng. Ann. Cas. 1150, and note.

It may be that the charge of a joint tort is colorable, and that it will ultimately be so held, but this does not change the alleged joint cause of action into a separable controversy for the purpose of removal. The case made by the plaintiff in his complaint, in the absence of bad faith, is determinative of the right of removal, and not the subsequent proceedings which may be had in the case. *Cin. & Texas Ry. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448; *C. & O. Ry. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121.

As plaintiff has stated a joint liability and there is no showing of bad faith, it follows that the case was improperly removed to this court, and the motion to remand must be allowed.

(d) Revenue officer.

TENNESSEE v. DAVIS.

Reported in 100 U. S. 257.

(1879.)

MR. JUSTICE STRONG delivered the opinion of the court: The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the states, and bringing also into view not merely the construction of an act of congress, but its constitutionality. That in this case the

defendant's petition for removal of the cause was in the form prescribed by the act of congress admits of no doubt. It represented that he had been indicted for murder in the circuit court of Grundy county, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defense, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenues; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire. The petition was verified by oath, and the certificate required by the act of congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the circuit court of the United States, if Section 643 of the Revised Statutes embraces criminal prosecutions in a state court, and makes them removable, and if that act of congress was not unauthorized by the constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such

officer or other person under any such law," the case may be removed into the federal court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the act of congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer. It makes such a claim a basis for the assumption of federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the act of congress does provide for the removal of criminal prosecutions for offenses against the state laws, when there arises in them the claims of the federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering state criminal laws by other courts than those established by the state. It has been strenuously urged that murder within a state is not made a crime by any act of congress, and that it is an offense against the peace and dignity of the state alone. Hence it is inferred that its trial and punishment can be conducted only in state tribunals, and it is argued that the act of congress can not mean what it says, but that it must intend only such prosecutions in state courts as are for offenses against the United States—offenses against the revenue laws. But there can be no criminal prosecution initiated in any state court for that which is merely an offense against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in state courts, it must intend those that are instituted for alleged violations of state laws, in which defenses are set up or claimed under United States

laws or authority. * * * (The court here discusses the constitutionality of the Removal Act in question and proceeds:)

It is true, the Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from state courts into the circuit courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an act was passed (3 Stat. 198) providing that if any suit or prosecution should be commenced in any state court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the act or under color thereof, it might be removed before trial into the circuit court of the United States, provided the act should not apply to any offenses involving corporal punishment. This act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the Act of March 3, 1815 (3 Stat., p. 233, Section 6), and re-enacted in 1817 for a period of four years.

So, in 1833, by the Act of March 2 (4 *Id.* c. 57, Section 3), it was enacted that in any case where suit or prosecution should be commenced in a state court of any state against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the federal circuit court of the proper district. The history of this act is well known. It was passed in consequence of an attempt by one of the states of the Union to make penal the collection

by United States officers within the state of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the senate by a vote of thirty-two to one, and in the house by a majority of ninety-two. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the judiciary committee which introduced the bill said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the state tribunals. Whether in criminal or civil cases, it gives this right of removal. Has congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the constitution speaks of all cases in law and equity, and these comprehensive terms cover all. * * * It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a state would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

The provisions of the Act of July 13, 1866 (14 Stat. 171, Section 67), relative to the removal of suits or prosecutions in state courts against internal revenue officers, provisions reenacted in Section 643 of the Revised Statutes, are almost identical with those of the Act of 1833, the only noticeable difference being, that in the latter act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word "prosecution" is, a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the constitution has been that it authorizes the removal from state courts to the circuit courts of the United States, alike civil and criminal cases, arising under the laws, the constitution, or treaties.

The subject has more than once been before this court, and it has been fully considered. * * *

It ought, therefore, to be considered as settled that the constitutional powers of congress to authorize the removal of criminal cases for alleged offenses against state laws from state courts to the circuit courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of federal law.

It follows that the first question certified to us from the circuit court of Tennessee must be answered in the affirmative. The second question is, "Whether, if the case be removable from the state court, there is any mode and manner of procedure in the trial prescribed by the act of congress?"

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a state, if they were real, would be for the consideration of congress. But they are unreal. While it is true there is neither in Section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The constitution has made them courts within the states to administer the laws of the states in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a state, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a state; that is, a division of sovereignty over certain matters. When this is

understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

The first question will be answered in the affirmative, and the second is answered as in the opinion.

(e) Deprivation of civil rights.

VIRGINIA v. RIVES.

Reported in 100 U. S. 313.

(1879.)

MR. JUSTICE STRONG delivered the opinion of the court: The questions presented in this case arise out of the following facts:

Burwell Reynolds and Lee Reynolds, two colored men, were jointly indicted for murder in the county court of Patrick county, Virginia, at its January term, 1878. The case having been removed into the circuit court of the state, and brought on for trial, the defendants moved the court that the venire, which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled on the ground that the court "had no authority to change the venire, it appearing (as the record stated) to the satisfaction of the court that the venire had been regularly drawn from the jury box according to law." Thereupon the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the circuit court of the United States for the western district of Virginia. This petition represented that the petitioners were negroes, aged respectively seventeen and nineteen years, and that the man whom they were charged with having murdered was a white man. It further alleged that the right secured to the petitioners by the law providing for the equal civil rights of all the citizens of

the United States was denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens; that by the laws of Virginia all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws of the state, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race. The petitioners further represented that they had applied to the judge of the court, to the prosecuting attorney, and to his assistant counsel, that a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color, but that this right had been refused them. The petition further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the county of Patrick, in any case, civil or criminal, in which their race had been in any way interested. They therefore prayed that the prosecution might be removed into the circuit court of the United States. The state court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for a removal of the case was renewed on the same petition, and again denied. The defendants were then tried again separately. One was convicted and sentenced, and a bill of exceptions was duly signed and made part of the record. In the other case the jury disagreed.

In this state of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the circuit court of the United States, November 18, 1878, which was at its next succeeding term after the first application for

removal, and a writ of *habeas corpus cum causa* was issued by virtue of which the defendants were taken from the jail of Patrick county into the custody of the United States marshal, and they are now held in jail subject to the control of that court.

No motion has been made in the circuit court to remand the prosecutions to the state court, but the commonwealth of Virginia has applied to this court for a rule to show cause why a mandamus should not issue commanding the judge of the district court of the western district of Virginia, the Hon. Alexander Rives, to cause to be redelivered by the marshal of said district to the jailer of Patrick county the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said commonwealth. The rule has been granted, and Judge Rives has returned an answer setting forth substantially the facts hereinbefore stated, and averring that the indictments were removed into the circuit court of the United States by virtue of Section 641 of the Revised Statutes.

If the petition filed in the state court before trial, and duly verified by the oath of the defendants, exhibited a sufficient ground for a removal of the prosecutions into the circuit court of the United States, they were in legal effect thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the state court subsequent to the removals were *coram non judice* and absolutely void. This, by virtue of the express declaration of Section 641 of the Revised Statutes, which enacts that, "upon the filing of such petition, all further proceedings in the state court shall cease, and shall not be resumed except as thereafter provided." In *Gordon v. Longest* (16 Pet. 97) it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, "it is the duty of the state court to 'proceed no further in the cause,' and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the court of appeals, is *coram non judice*." To the same effect is *Insurance Company v. Dunn*, 19 Wall. 214.

It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court and

transferred it to the federal court. Section 641 of the Revised Statutes provides for a removal "when any civil suit or prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," etc. It declares that such a case may be removed before trial or final hearing.

Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of congress. It rests upon the fourteenth amendment of the constitution and the legislation to enforce its provisions. That amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Sections 1977, 1978, Rev. Stat. They enact that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Section 1978 enacts that all citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. The plain object of these statutes, as of the constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

The provisions of the fourteenth amendment of the constitution we have quoted all have reference to state action exclusively,

and not to any action of private individuals. It is the state which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against state infringement of those rights. Section 641 was also intended for their protection against state action, and against that alone.

It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a question whether the remedy of removal of cases from state courts into the courts of the United States, given by Section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a

defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he can not affirm that it is denied, or that he can not enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case—that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced—Section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court. We do not say that congress could not have authorized the removal of such a case into the federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm any thing. It is sufficient to say now that Section 641 does not.

It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which Section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he can not swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he can not affirm that they are

actually denied, or that he can not enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he can not enforce his rights at a subsequent stage of the proceedings. The statute was not therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the federal court does not appear to have made any case for removal, if we are correct in our reading of the act of congress. It did not assert, nor is it claimed now, that the constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the state all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Rules followed in *Kentucky v. Powers*, 201 U. S. 1.

(f) Local prejudice.

The act of March 3, 1887, in reference to removal for prejudice, is construed by Justice Harlan in *Malone v. Railway Co.*, 35 Fed. 625 (1888).

IN RE PENNSYLVANIA COMPANY.

Reported in 137 U. S. 451.

(1890.)

MR. JUSTICE BRADLEY delivered the opinion of the court: This is a petition of the Pennsylvania Company, a corporation and a citizen of Pennsylvania, for a mandamus to be directed to the judges of the circuit court of the United States for the district of Connecticut, commanding them to reinstate, take

jurisdiction of and try and adjudge a certain suit of one Alberto T. Roraback, a citizen of Connecticut, against the said Pennsylvania Company. The suit had been commenced on the fourth of June, 1889, by writ returnable the first Monday of July, 1889, in the court of common pleas for Litchfield county, in the state of Connecticut. The demand in said suit was for the sum of five hundred dollars. In the term of March, 1890, of said court of common pleas the company filed a petition for the removal of the suit to the United States circuit court for the district of Connecticut, on the ground of prejudice and local influence, filing therewith proper affidavit and bond, and the said court accepted said petition and bond, and granted the application and ordered the suit to be removed. On the opening of the circuit court of the United States in April, the company entered in said circuit court a copy of the record, and also filed a petition to the same court reciting the steps already taken, realleging the ground of removal, and praying the court to take jurisdiction of the suit; and filed an additional affidavit setting forth all the facts as to the existence of the alleged prejudice and local influence in the state court, and that the petitioner would not be able to obtain justice therein. But afterwards the plaintiff in the suit moved to remand the same to the state court, on the ground that the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interest and costs. The circuit judge granted the application and made an order for remanding the cause, and the circuit court refuses to take jurisdiction of the same. 42 Fed. Rep. 420. Wherefore the present mandamus is prayed. * * *

There is another question raised in this case, on which it is proper that we should express our opinion. It arises upon the following words of the act: "When it shall be made to appear to said circuit court that from prejudice," etc. How must it be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the state court? The Act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the state court. Revised Statutes, Section 639, Subdivision Third. By the Act of 1887 it must be made to appear to the court. On this point, also,

various opinions have been expressed in the circuit courts. Our opinion is, that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the company would not be able to obtain justice in the court of common pleas for Litchfield county, or any other state court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient. *The petition for mandamus is denied.*

CITY OF TACOMA v. WRIGHT.

Reported in 84 Federal, 836.

(1898.)

HANFORD, District Judge: This is a suit in equity, commenced in the superior court of the state of Washington, for Pierce county, by the city of Tacoma, a municipal corporation of the state of Washington, against C. B. Wright, a citizen of the state of Pennsylvania, and several others, who are citizens of the state of Washington. The defendant Wright filed in the

superior court his petition and bond for removal of the cause into this court, and in his petition for removal alleged, as his ground for removal, "that, from prejudice and local influence, he will not be able to obtain justice in your honorable court, or in any other court of the state of Washington to which he may, under the laws of the state of Washington, have the right, on account of such prejudice or local influence, to remove said cause." An order was entered accepting the petition and bond, and directing the cause to be certified to this court. Said defendant has also petitioned this court to take jurisdiction, and has filed several affidavits tending to prove that in the city of Tacoma, during several years preceding the commencement of this suit, there has been public denunciation of the defendant Wright and his associates, on account of the transactions out of which this lawsuit has arisen, and that there has been, and is, in the minds of a great number of citizens of Tacoma, a strong belief that the people of Tacoma have been defrauded in said transactions, and a disposition to hold the defendant Wright responsible therefor. The plaintiff has filed in this court a motion to remand the cause, supported by affidavits controverting the affidavits on the part of said defendant.

The amount at stake in the litigation is so large in proportion to the amount of taxes annually collected in Tacoma that it is argued every taxpayer of the city and county has a direct pecuniary interest sufficient in amount to create a presumption of bias. I am satisfied from the showing made that there is in Pierce county considerable prejudice against the defendant Wright, and local influences which may operate against him in the trial and determination of this case. If it were only necessary for a nonresident defendant to prove the existence of prejudice and local influence in order to make the complete showing necessary to the right of removal, the defendant's right in this case would be clear; but the statute seems to require the circuit court to make a finding that, because of prejudice or local influence, the defendant will not be able to obtain justice either in the court in which the action is brought, or in any other court of the state to which he will have the right, on account of such prejudice or local influence, to have the cause transferred. If by this statute it is meant that the circuit court must remand

an equity case which has been removed on account of prejudice or local influence, unless satisfied from the evidence presented that the judge of the court in which the case was commenced, and all the other judges of the state courts who might be called to hear and decide the case, are so far affected by prejudice and local influence as to be incapable of rendering a fair decision, this case would necessarily have to be remanded; and there would be few cases in which a United States circuit court would feel warranted in making the finding necessary to support its jurisdiction. But the statute, as it has been construed by the higher courts, does not impose so heavy a strain upon the circuit courts.

In the case of *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. 1-21, Judge Taft interpreted the statutes as follows:

“The ‘justice’ which the defendant must be prevented from obtaining in the state court to entitle him to a removal is certainly not a judgment or decree in his favor. The phrase does not refer to any particular result in the case, but rather to the influences which will operate upon the tribunal in deciding it. The justice which the defendant has the right to obtain is a hearing and decision by a court wholly free from, and not exposed to the effect of, prejudice and local influence. If it is made to appear to the United States court that prejudice and local influence do exist, which would have a natural tendency to operate directly upon the state court, and furnish an interested motive for the judges to decide the case against the petitioning defendant, it is the duty of the United States court to grant the removal without any inquiry into the facts whether the particular state judges before whom the case is pending could and would rise above such prejudice and local influence, and decide the case unmoved by any personal benefit or disadvantage which would follow their decision. In a majority of cases, doubtless, the state judges would do their duty without fear or favor; but the petitioning defendant is not to be exposed to the chance that prejudice and local influence may work against him. The existence of local influence, and its natural tendency to operate upon the court, being shown, the tribunal is no longer one in which, in the sense of the removal statute, justice can be obtained.”

The evidence necessary to support the federal jurisdiction does not have to prove morally that the petitioning defendant can not obtain a just decision in the state court. It is only necessary to present to the circuit court evidence suitable to the case, and sufficient to prove legally that prejudice and local influence do exist, which will naturally operate to the disadvantage of the defendant in the trial of his case before a state tribunal. * , * *

All the affidavits filed herein were made by reputable persons, who are well informed, and in whom this court has confidence. It is my opinion that the showing in favor of the petitioner's right to remove the case into this court is as strong and satisfactory as, in the nature of things, such showing can be made; and although the evidence does not justify a finding that the judges of the state court can not or will not treat the petitioning defendant fairly throughout the proceedings, and render a just decision, notwithstanding the prejudice shown to exist in the community, and all local influences, still I consider that it is the duty of this court to grant the petition.

Counsel for the plaintiff has directed attention to the law of the state of Washington on the subject of change of venue (2 Ballinger's Codes & St. Wash., Sections 4857, 4858), in which it is provided that:

"The court may, on motion, in the following cases, change the place of trial, when it appears by evidence or other satisfactory proof: * * * If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision one of the last preceding section, and in other cases to the most convenient county where the cause alleged does not exist."

It is argued that the right to invoke the jurisdiction of a federal court on the ground of prejudice and local influence is not given except in cases wherein the petitioning defendant is able to show that he can not obtain justice in the state court in which the action was commenced, or in any other court in the state to which the cause may be removed on a motion for a change of venue.

In the case of *Rike v. Floyd*, 42 Fed. 247, 248, Judge Sage is reported to have said:

“The removal act requires a showing that the local prejudice complained of would prevent an impartial hearing, either in the county where the action is pending, or any other county to which, under the state laws, it could be removed.”

This is not an accurate statement of the words or meaning of the statute. State laws which merely authorize a change of venue, without giving to a defendant the right to remove a cause, are not to be considered as affecting in any way a defendant's right to remove a cause into a United States circuit court. *Smith v. Lumber Co.*, 46 Fed. 819-824; *Herndon v. Railroad Co.*, 73 Fed. 308; *Bonner v. Mickle*, 77 Fed. 485. Under the laws of this state, it will be within the discretion of the superior court for Pierce county to grant or refuse an application for a change of venue, unless the defendant can prove that the judges in Pierce county are actually prejudiced or financially interested in the case. *Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466.

The defendant's petition will be granted, and the motion to remand will be denied.

See *Cochran v. Montgomery County*, 199 U. S. 260, for similar reasoning in a case where A of one state sues B of same state and C of another.

(g) Procedure on removal.

GOLD-WASHING AND WATER COMPANY v. KEYES.

Reported in 96 U. S. 199.

(1877.)

ERROR to the circuit court of the United States for the district of California.

This was a suit in the nature of a bill in equity, commenced July 29, 1876, in a state court of California, by Keyes, the owner of certain agricultural lands situated on Bear river, against the Little York Gold-Washing and Water Company, and others, the plaintiff in error, who were engaged in hydraulic mining upon the highlands adjacent to that river and its tributaries to restrain them from depositing the tailings and debris from their several mines in the channel of the river. The defendants demurred to the complaint; and, before the term at which

the cause could be first tried, filed their petition, accompanied by the necessary bond, for the removal of the suit to the circuit court of the United States for the district of California, under the provisions of the Act of March 3, 1875 (18 Stat. 470). The material parts of the petition, which was otherwise in due form, are as follows:

“Your petitioners further represent that they are the owners of certain extensive and valuable gold-bearing placer mines, situated in the counties of Placer and Nevada, in said state of California, which they claim under the laws of the United States, and are engaged in working the same by what is known as the hydraulic process of mining; that said hydraulic process necessarily requires the employment of large heads or streams of water, used through pipes or hose, under heavy pressure, for the purpose of loosening or washing the gold-bearing earth and gravel contained in said mining claims into large flumes, where the gold is separated from the earth by the action of the water, and is retained. That the gold in said claim is distributed in very fine particles throughout the entire gravel deposit, and can not be obtained in any other manner, nor can said mining claims of your petitioners be worked in any other manner save by said hydraulic process; that in working said mines your petitioners necessarily deposit in the channels of the Bear river and its tributaries large quantities of tailings from said mines; that the said Bear river and its tributaries are the natural and only outlets for said hydraulic gold mines; and your petitioners claim the right to work, use, and operate said mines, and, in so doing to use the channels of Bear river and its tributaries as a place of deposit for their said tailings, under the provisions of the act of congress of the United States, entitled ‘An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes,’ passed July 26, 1866, and the act amendatory thereof, passed July 9. 1870, and the ‘Act to promote the development of the mining resources of the United States,’ passed May 10, 1872, and other laws of the United States.

“That said action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States above mentioned, as well as the pre-emption laws of the United States. That the mines of your

petitioners are of great value, to wit, of an aggregate value of not less than ten millions of dollars; and that if your petitioners are prevented from using the said channels of Bear river and its tributaries as outlets for their said tailings and water, their said mines will be thereby rendered wholly valueless.”

The state court accepted the petition and bond, and transferred the suit; but the circuit court remanded it, on the ground that no real or substantial controversy, properly within the jurisdiction of that court, appeared to be involved. To obtain a review of this action of the circuit court, the present writ of error has been brought, under the provision of Section 5 of the Act of 1875, which gives authority for that purpose.

Mr. S. M. Wilson for the plaintiffs in error.

Although the construction of the Act of March 3, 1875 (18 Stat. 470), under which the removal of this cause was ordered, has not been judicially settled, the sixth article of the constitution, which differs from it only in not limiting the jurisdiction of the courts of the United States to cases of a civil nature, has been the subject of repeated decisions. *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Id. 264; *Osborne, et al., v. The Bank of the United States*, 9 Id. 738. And the case at bar seems to be within their principles.

Another argument in favor of the jurisdiction of the circuit court is found in the fact that, if the case should proceed in the state court, it may eventually be brought here by the defendants, should a decision adverse to their rights under the acts of congress be rendered. *Delmas v. Insurance Company*, 14 Wall. 661; *Hall v. Jordan*, 15 Id. 393; *Carpov v. Kelly*, 16 Id. 610.

Mr. Montgomery Blair, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: It is well settled that in the courts of the United States the special facts necessary for jurisdiction must in some form appear in the record of every suit, and that the right of removal from the state courts to the United States courts is statutory. A suit commenced in a state court must remain there until cause is shown under some act of congress for its transfer. The record in the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is

not, and the omission is not afterwards supplied, the suit must be remanded.

The attempt to transfer this cause was made under that part of Section 2 of the Act of 1875 which provides for the removal of suits "arising under the constitution or laws of the United States." In the language of Chief Justice Marshall, a case "may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends upon the construction of either" (*Cohens v. Virginia*, 6 Wheat. 379); or when "the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, or sustained by the opposite construction" (*Osborne v. Bank of the United States*, 9 *Id.* 822).

The question of jurisdiction was submitted to the circuit court, upon the record sent from the state court. Upon the pleadings alone, it is clear the defendants had not brought themselves within the statute. The complaint simply set forth the ownership by Keyes of his property, and the acts of the defendants which, it was claimed, created a private nuisance. No rights were asserted under the constitution or laws of the United States, and nothing was stated from which it could in any manner be inferred that the defendants sought to justify the acts complained of by reason of any such authority. The defendants, in their demurrer, which set forth specifically the grounds relied upon, presented no question of federal law. The validity of the judgment of the circuit court, therefore, depends upon the sufficiency of the facts set forth in the petition for removal.

For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the courts must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly. Thus, in *Insurance Company v. Pechner* (95 U. S. 183), we decided that a petition for removal, on account of the citizenship of the parties, did not divest the state court of its power to proceed; because, when taken in con-

nection with the pleadings and process in the cause, it failed to show such citizenship at the time of the commencement of the action as would give the circuit court jurisdiction. And in *Amory v. Amory* (*Id.* 186) we held to the same effect in reference to a petition which failed to set forth the personal citizenship of the parties.

The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.

In this petition, the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes.

Certainly, an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine.

The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause can not be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the

constitution or laws upon the facts involved. That this was the intention of congress is apparent from Section 5 of the Act of 1875, which requires the circuit court to dismiss the cause, or remand it to the state court, if it shall appear "at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said circuit court."

Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, "in legal and logical form," such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient, and that the circuit court did not err in remanding the cause.

The Act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it, which, until the statute has been longer in operation, it will not be easy to decide in advance. For the present, therefore, we think it best to confine ourselves to the determination of the precise question presented in any particular case, and not to anticipate any that may arise in the future. Under these circumstances, the present case is not to be considered as conclusive upon any question except the one directly involved and decided. *Judgment affirmed.*

REMOVAL CASES.

Reported in 100 U. S. 457.

(1879.)

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court: Three principal questions are presented by these cases. They are:

1. Was the suit pending in the state court one which could by law be removed to the circuit court of the United States?

2. If it could, was the application for removal made in time, and was it sufficient in form to effect a transfer? and,

3. If the transfer was lawfully made, are the decrees of the circuit court, giving the mortgage priority over the mechanic's lien and the title of the Delaware County Railroad Company, right?

These will be considered in their order.

1. As to the right of removal. * * *

The petition filed in this case was sufficient in form.

PETITION.

"In the Circuit Court of Delaware county, Iowa.

"THE DELAWARE RAILROAD CONSTRUCTION CO. v. LEWIS H. MEYER AND WILLIAM DENNISON, *Trustees*.

"Now come your petitioners, Lewis H. Meyer, and Wm. Dennison, trustees, and state:

"That the Delaware Railroad Construction Company and all persons who have come in as intervenors in the above entitled cause are citizens of the state of Iowa; that Lewis H. Meyer is a citizen of the state of New York, and William Dennison a citizen of the state of Ohio.

"That they have reason to believe and do believe that from prejudice or local influence they will not be able to secure justice, by reason of such prejudice or local influence.

"That said cause can be fully and finally determined in the United States circuit court for the district of Iowa.

"That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs, and they make and file in this court a bond, with good and sufficient security, for their entering in such circuit court, on the first day of its next session, a copy of the records in said suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, and they pray of said court to accept said petition and bond, and order the transfer of the said cause to the said circuit court of the United States."

BOND.

“In the Circuit Court of Delaware county, Iowa.

“Know all men by these presents, that we, Lewis H. Meyer and William Dennison, principals, and John E. Henry and Charles Whitaker, as sureties, are held and firmly bound unto the Delaware Railroad Construction Company, and all other persons whom it may concern; in the penal sum of one thousand dollars, to which payment we bind ourselves and each of us by these presents. Given under our hands this fifteenth day of May, 1875.

“The conditions of this obligation are these: The said Lewis H. Meyer and William Dennison have applied to the circuit court of said county to remove a certain cause pending in said court, wherein the Delaware Railroad Construction Company are plaintiffs, and the said Lewis H. Meyer, trustee, successor to John Edgar Thompson, and William Dennison, trustees, and many others are defendants, from the said circuit court to the circuit court of the United States for the district of Iowa:

“Now, if said Meyer and Dennison shall enter in the said circuit court of the United States for the District of Iowa, on the first day of the next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said circuit court if it shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in said suit if special bail was originally required therein, then this obligation shall be void; otherwise in full force.

“WILLIAM DENNISON and L. H. MEYER, *Trustees*,

“By Grand and Smith, their attorneys.

“C. Whitaker,

“John E. Henry, *Sureties*.”

Enough appeared on its face to entitle the petitioner to his removal. While it included a statement of belief that, from prejudice or local influence, justice could not be secured by a trial in the state court, no affidavit to that effect was filed; and this statement could be rejected as surplusage, leaving still good cause for the removal on account of the citizenship of the parties. Although Meyer's name was included as a petitioner,

that of Dennison was included also; and, as Meyer was not a party to the suit, his name could be rejected as surplusage, and the petition left to stand as that of Dennison alone. The paper was evidently drafted and put on file under the belief that Meyer would be substituted for Thompson as a party to the suit. This having been unexpectedly refused, it was presented to the court by the counsel of Dennison, without amendment, as in legal effect the petition of Dennison alone. This, we think, might lawfully be done. Under the circumstances, it was the duty of the court to treat the application as coming from Dennison only.

The petition was not signed. No objection was made on this account in the state court; and it came too late in the circuit court. If it had been made in the state court, the defect—if in fact there was one—would, no doubt, have been cured at once by the signature of counsel. The petition was in writing. On its face, it purported to be the petition of Meyer and Dennison; and it was in fact the petition of Dennison. This the court knew, because it was actually presented by the counsel of Dennison, and was accompanied by a bond purporting also to be signed in the name of Meyer and Dennison. In short, everything in the whole proceeding showed that it was in fact what, under the circumstances, it purported to be—the application of Dennison, made in good faith, for the removal of the cause.

The bond was sufficient in form. The condition was such as the statute required. There was no special bail in the case. Nothing was, therefore, to be secured by the bond but the filing of the transcript in the circuit court, on the first day of its then next term, and the payment of any costs that might be awarded by that court, in case it should hold that the suit had been wrongfully or improperly removed. No objection was made to the sufficiency of the surety. The only complaint seems to have been that one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa and the practice of the state court. Without determining whether this would have justified the court in not accepting the bond, if he had been the only surety, it is sufficient to say that the act of congress does not make it necessary that two persons should sign the bond as sureties. “Good and sufficient surety”

is all that is required; and this is satisfied if there is one surety able to respond to the condition of the bond. The question here is not whether the court below had the right to pass upon the sufficiency of the surety, but whether, upon the facts as they appear in this record, it was justified in refusing to accept this bond. We are now examining the case after judgment below in reference to errors which are alleged to have occurred in the progress of the cause. If the state court refuses to accept a bond offered by a petitioner for removal which has "good and sufficient surety" in law, it is error that may be reviewed here. That court has no discretion in such a matter. Its action is governed by fixed rules. Here, as no objection was made to the pecuniary responsibility of the one person who signed as surety, and was competent under the laws of Iowa to do so, it was clearly error for the court to refuse to accept the bond because a second surety was an attorney of the court. Such being the case, we are clearly of opinion that, so far as the form of the application was concerned, the state court was not justified in refusing to accept the petition and bond, and in proceeding further in the cause.

We think also the application was made in time. It is conceded that the petition was filed during the first term of the court at which the suit could be tried, after the Act of 1875 went into operation. It has, so far, as we know, been uniformly held on the circuit, and to our minds correctly, that, in suits pending when the act was passed, the application was in time, if made at the first term of the court thereafter. *Baker v. Peterson*, 4 Dill. 562; *Hoadley v. San Francisco*, 3 Saw. 553; *Andrews v. Garrett*, 2 Cent. Law Jour. 797; *The Merchants' & Manufacturers' National Bank v. Wheeler*, 13 Blatch. 218; *Crane v. Reeder*, 15 Alb. Law Jour. 103. This disposes of one objection made to the time when the petition was filed. * * *

In *Traction Co. v. Mining Co.*, 196 U. S. 239, 244, 245, Justice Harlan makes a summary statement of certain well-settled principles applicable to removals, namely:

"1. If a case be a removal one, that is, if the suit, in its nature, be one of which the circuit court could rightfully take jurisdiction, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent

proceeding in that court will be void. *Railroad Company v. Mississippi*, 102 U. S. 135, 141; *Railroad v. Koontz*, 104 U. S. 5, 14; *Steamship Company v. Tugman*, 106 U. S. 118, 122; *St. Paul & Chicago Ry. Co. v. McLean*, 108 U. S. 212, 216; *Crehore v. Ohio, etc., Railway Co.*, 131 U. S. 240, 243; *Kern v. Huidekoper*, 103 U. S. 485, 493.

"2. After the presentation of a sufficient petition and bond to the state court in a removal case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating Section 720 of the Revised Statutes, forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *French, Trustee, v. Hay*, 22 Wall. 238, 252; *Dietzsch v. Huidekoper*, 103 U. S. 494, 496, 497; *Moran v. Sturges*, 154 U. S. 256, 270. See, also, *Sargent v. Holton*, 115 U. S. 348; *Harkrader v. Wadley*, 172 U. S. 148, 165; *Gates v. Bucki*, 53 Fed. Rep. 961; *Texas & Pacific Ry. Co. v. Kuteman*, 54 Fed. Rep. 547; *In re Whitelaw*, 71 Fed. Rep. 733, 738; *Iron Mountain R. R. Co. v. Memphis*, 96 Fed. Rep. 113; *James v. Central Trust Co.*, 98 Fed. Rep. 489.

"3. It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone v. South Carolina*, 117 U. S. 430, 432; *Carson v. Hyatt*, 118 U. S. 279, 281; *Marshall v. Holmes*, 141 U. S. 589, 595; *Burlington, etc., Railway Co. v. Dunn*, 122 U. S. 513, 515."

(h) Subsequent proceedings.

(aa) In the state court.

CHESAPEAKE & OHIO RAILWAY COMPANY v. McCABE.

Reported in 213 U. S. 207.

(1909.)

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court: From the foregoing statement it is apparent that the principal question in this case, and it is the one which we regard as decisive of it, concerns the effect of the judgment rendered in the circuit court of the United States after it had taken jurisdiction, which was undertaken to be set up in the state court as a bar to further proceedings therein. It is contended by the defendant in error that when the court of appeals of Kentucky rendered its judgment holding that the case was not a removable one (March 5, 1902), that was a final judgment upon the question of

jurisdiction, and the case should have been brought here for review and determination. But we are of opinion that this contention is not tenable. The case was three times in the court of appeals of Kentucky, and only the last judgment in that court was a final one. As we have seen, the state circuit court, in which the action was originally begun, held the case was a removable one, and from that order an appeal was prosecuted to the court of appeals of Kentucky, that court, concluding that both railroads could be properly joined in the action, held that the case was not removable, and remanded the same to the state court for further proceedings.

Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the court of appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined in the judgment now under review to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser v. Hemphill*, 198 U. S. 173, and cases therein cited.

The circuit court of the United States having taken jurisdiction of the case upon the removal, and having refused to remand it, and proceeded to final judgment, should the state court, when that judgment was offered to be pleaded before it, have given effect to the judgment? That is the federal question presented in this case. It is insisted for the defendant in error that the right of removal depends upon the presentation to the state court of a proper petition for removal, which petition should contain the essential allegations necessary to make out a case under the statute for that purpose, and that unless this is done the jurisdiction of the state court is not divested. And in aid of that contention cases are cited which hold that a plaintiff has the right to make a cause of action joint when acting in good faith, and when he has so made it, the action

is deemed to be joint for the purpose of determining the right of removal. *Alabama Great Southern Railway Co. v. Thompson*, 200 U. S. 206; *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Bohon*, 200 U. S. 221. And inasmuch as the state court has held that the Maysville and Big Sandy Railroad Company, under the law of Kentucky, could be properly joined as defendant with the Chesapeake and Ohio Railway Company in this case, it is insisted that the plaintiff had a right to sue both companies, and that the averment in the petition for removal, that the joinder was fraudulent, goes for nothing in the absence of a showing of facts which make such joinder fraudulent in fact. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176.

It is insisted that this contention is supported by a line of cases in this court, which have held that a state court is not bound to surrender its jurisdiction until a petition for removal has been filed which upon its face shows that the petitioner has a right to the transfer of the case. And it is contended that the petition in this case, in view of the decision of the court of appeals of Kentucky as to the right to prosecute a joint cause of action, did not make a case for removal, and, therefore, the state court did not lose its jurisdiction. To maintain the general proposition that a petition making a case for removal upon its face is essential to confer jurisdiction upon the United States circuit court, attention is called to a number of cases decided in this court: *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt and another*, 118 U. S. 279; *Stevens v. Nichols*, 130 U. S. 230; *Crehore v. Ohio & Mississippi Railway Co.*, 131 U. S. 240; *Jackson v. Allen*, 132 U. S. 27; *Graves v. Corbin*, 132 U. S. 571.

In these cases the jurisdiction of the state courts was maintained for the want of an adequate petition showing facts which required an order of removal. In none of them was involved the effect of the judgment of a United States circuit court taking jurisdiction upon removal, unreversed and in full force and effect. That the circuit court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject. In Section 3 of the Removal Act (1 Comp. Stat. 510) it is provided that, a petition and bond being entered in the

circuit court of the United States, the cause shall proceed in the same manner as if it had originally been commenced in the circuit court. And in Section 5 of the act it is provided that the circuit court of the United States may at any time that it appears that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, or that the parties to the suit have been improperly and collusively joined for the purpose of creating a case removable under the act, remand and dismiss the same as justice may require. Section 7 of the Act of 1875 (1 Comp. Stat. 512) provides that a circuit court, in any case removable under the act, shall have power to issue a writ of *certiorari* to the state court, commanding that court to make return of the record in any cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce such writ according to law.

It is apparent that these provisions are intended to confer jurisdiction upon the United States circuit court to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the state court to remove the case, the party desiring the removal may file a transcript of the record in the circuit court of the United States, and if the case was a removable one it is immaterial that the state court has denied the petition for removal. *Kern v. Huidekoper*, 103 U. S. 485, and cases therein cited. And it was held in *Traction Company v. Mining Co.*, 196 U. S. 239, that notwithstanding the refusal of the state court to make an order of removal, the controversy being removable to the United States circuit court, that court might protect its jurisdiction by injunction against further proceedings in the state court.

In view of these provisions of the statute and the decisions of this court construing the same we think it was the intention of congress to confer upon the circuit court of the United States a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. And while it is true that when the judgment of a state court is under consideration it may properly be held

that the courts of the state are not obliged to surrender their jurisdiction until a petition is filed making a proper ground for removal, it does not follow that, when the jurisdiction of the circuit court of the United States is invoked, its judgment holding a case removable and rendering a final judgment therein, can be disregarded by the state court where it is properly set up before judgment, as was done in the present case. If this be not so, the state court may ignore an unreversed judgment of the United States circuit court deciding a question of federal jurisdiction within the power conferred upon it by congress, and wherein it was intended to give to the state court no right to review such action, and wherein the judgment is binding until properly reversed in this court, in which the question of jurisdiction can alone be finally settled, whether brought here from a state or federal court.

The circuit court of the United States having an independent jurisdiction to determine the removability of the case, what is the proper procedure when, as has sometimes happened, the federal court differs from the state court upon this question? This question was dealt with in *Railroad Company v. Koontz*, 104 U. S. 5, 15, wherein Mr. Chief Justice Waite, speaking for the court, said:

“The right to remove is derived from a law of the United States, and whether a case is made for removal is a federal question. If, after a case has been made, the state court forces the petitioning party to trial and judgment, and the highest court of the state sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error the case is sent back to the state court with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in *Gordon v. Longest*, 16 Pet. 97. The petitioning party has the right to remain in the state court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the circuit court and require the adverse party to litigate with him there, even while the state court is going on. This was actually done in the *Removal Cases*. When the suit is docketed in the circuit court, the adverse party may move to remand. If his motion is decided against

him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the circuit court, and direct that the suit be sent back to the state court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the circuit court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbitt v. Clark*, 103 U. S. 606. If, in such a case, we reverse the order of the circuit court to remand, our instructions to that court are, as in *Relfe v. Rundle*, 103 U. S. 222, to proceed according to law, as with a pending suit within its jurisdiction by removal."

So far as the case now before us is concerned it is immaterial that under the Act of March 3, 1887, the decision of a circuit court of the United States remanding a case to the state court is final. *Missouri Pacific Railway Company v. Fitzgerald*, 160 U. S. 556.

Again, speaking for the court on the same subject, in *Burlington, etc., Railway Co. v. Dunn*, 122 U. S. 513, 516, Mr. Chief Justice Waite said:

"But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition in the circuit court, and have the suit docketed there. If the circuit court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount."

From these decisions it is apparent that, while the petitioner, in the event of an adverse decision, in the state court, may remain in that court, and after a final judgment therein bring the case here for review, he is not obliged to do so. He may file the record in the circuit court of the United States, as was said by Mr. Chief Justice Waite, while the case is going on in the state court. The federal statute then gives to the United States circuit court jurisdiction to determine the question of removability, and it has the power, not given to the

state court, to protect its jurisdiction, notwithstanding Section 720 of the Revised Statutes, by an injunction against further proceedings in the state courts. *Traction Company v. Mining Company*, 196 U. S. 239.

In order to prevent unseemly conflict of jurisdiction it would seem that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the circuit court of the United States is reviewed in this court. If the federal jurisdiction is not sustained the case will be remanded with instructions that it be sent back to the state court as if no removal had been had. *Railroad Company v. Koontz*, *supra*.

Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the federal court in aid of its own jurisdiction, or a writ of *certiorari* requiring the state court to surrender the record under the Act of 1875, is the state court obliged to give effect to the judgment of the United States circuit court, from which no writ of error is taken, and rendered in the federal court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the federal court, we think that such federal judgment can not be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Navigation Company v. Iowa Homestead Company*, 123 U. S. 552, this court considered the effect of a judgment rendered in the federal court upon removal from the state court. In that case it appeared that the federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state as the plaintiff. The state court of Iowa refused to give effect to the judgment of the federal court, and its judgment was reversed.

Mr. Chief Justice Waite, speaking for the court, said (123 U. S. 559) :

“Whether in such a case the suit could be removed was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.”

In *Dowell v. Applegate*, 152 U. S. 327, the benefit of a judgment in the circuit court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff inasmuch as the federal court had no jurisdiction of the suit in which the sale was ordered. It was held in this court that even if the federal court erred in assuming or retaining jurisdiction of the suit, its decree being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (152 U. S. 340) :

“These cases establish the doctrine that, although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Bors v. Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree can not, for that reason, be collaterally attacked, or treated as a nullity.

“These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States.

But that was a question which the circuit court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court."

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the state circuit court that court held the case removable, and the record was filed in the federal court. Afterwards that court, upon the application of the plaintiff, refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the state court, and that court denied effect to the federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the state court, denying his right secured by the federal judgment. It was open to the plaintiff to bring the adverse decision of the federal court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently upon the theory that the judgment of the federal court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable.

The judgment of the court of appeals of Kentucky is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

After denial of petition to remove a removable case, all proceedings in the state court are *coram non judice*. *Gordon v. Longest*, 16 Pet. 97 (1842).

RAILWAY v. KOONTZ.

Reported in 104 U. S. 5.

(1881.)

ERROR to the supreme court of appeals of the state of Virginia.

These cases are substantially alike, and present the following facts: The Baltimore and Ohio Railroad Company was incorporated by the state of Maryland on the 28th of February, 1827, to build and operate a railroad from Baltimore, in Maryland, to some suitable point on the Ohio river. By the terms of the charter the annual election of directors were to be held in Baltimore. On the 2d of March following, the state of Virginia granted the company the same rights and privileges in Virginia that had been granted to it in Maryland, except that no lateral road could be built in Virginia without the consent of the legislature, and the road was not to strike the Ohio at a point lower than the mouth of the Little Kanawha. Under this authority from the two states a road was built from Baltimore to Wheeling, in Virginia. When the state of West Virginia was formed, it took from Virginia all the territory occupied by the road in that state, and from that time no part of the original line has been within the present state of Virginia.

On the 20th of August, 1873, under a lease from the Washington City, Virginia Midland, and Great Southern Railroad Company, a Virginia corporation, of all its railroad lying between Strasburg and Harrisonburg, in Virginia, the Baltimore and Ohio Company took the exclusive possession of and operated the leased property, using for that purpose the powers and franchises of the Virginia corporation. While so operating the leased road an accident happened to one of the passenger trains, which resulted in the death of several persons, whose administrators, the defendants in error, each of whom was a citizen of Virginia, thereupon brought in a state court of that state, under her statute, these suits to recover of the company damages for such death.

On the 2d of September, 1876, which is conceded to have been in time, the company filed its petitions in the state court for the removal of the cases to the proper circuit court of

the United States, on the ground that the company was a citizen of Maryland and the several plaintiffs citizens of Virginia. The plaintiffs answered the petition in each case, denying that the company was a citizen of Maryland, and claiming that for all the purposes of these suits it was a citizen of Virginia. After hearing, the court refused to recognize the removal, because, as was held, by leasing and operating the road of the Virginia corporation under the Virginia charter, the company became, for all the purposes of that business, a citizen of Virginia. To this ruling exceptions were taken in due form and made part of the several records.

It nowhere appears that copies of the records of the state court were ever entered in the circuit court; but on the 19th of December, 1876, the company asked and obtained from the state court leave to plead, and in due time thereafter pleas of not guilty were put in. One case was tried in the state court on the 6th of April, 1877, another on the 10th of April, 1878, and the other on the 9th of December afterwards. Judgment was given in each case for the plaintiff. The company was represented at the trials, and exceptions of various kinds were taken. The causes were all carried to the supreme court of appeals of the state, where the judgments were affirmed. The record in each case shows distinctly that errors were assigned on the ruling upon the petition for removal, and that the decision was adverse to the company. The cases are now here on writs of error. * * *

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court: The questions presented for our consideration are: 1. Whether a case for removal was made by the company; and, 2, if it was, whether, as it does not appear affirmatively that copies of the records have been entered in the circuit court, the company has lost its right to have the judgments reversed for the original errors in that behalf. * * * (The court holds that there is diversity of citizenship here and therefore the case is removable, and proceeds:)

The only remaining question is whether the company can now claim a reversal of the judgments below on account of this error, since it does not appear that copies of the records in the state court have been entered in the circuit court. The

state court of original jurisdiction directly decided, in accordance with the claims of the several defendants in error, that upon the showing made the company was not entitled to a removal, but must remain and defend the suits in that court. It was conceded on the argument that if the judgment had been rendered before the first day of the next term of the circuit court of the United States, there could be a reversal if the case was in fact removable. The position of the defendants in error seems to be, that as the company appeared and went on with the causes in the state court after the next term in the circuit court, without showing that the copies of the records had been entered in that court, it in effect waived its right to a removal and submitted itself again voluntarily to the jurisdiction of the state court.

We have uniformly held that if a state court wrongfully refuses to give up its jurisdiction on a petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. *Insurance Company v. Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Railroad Company v. Mississippi*, 102 *Id.* 135. It is also a well-settled rule of decision in this court, that, when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Insurance Company v. Dunn*, *supra*; *Railroad Company v. Mississippi*, *supra*. The entering of the copy of the record in the circuit court is necessary to enable that court to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the state court to "proceed no further." The provision of the Act of 1875 is in this respect substantially the same as that of the twelfth section of the Judiciary Act of 1789, and requires the state court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the circuit court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed when the removal is demanded in proper form and a case for removal made. Proceedings in the circuit court may begin

when the copy is entered. Such is clearly the effect of the cases of *Gordon v. Longest* and *Kanouse v. Martin*, where it does not appear that the record was ever entered in the circuit court. In *Insurance Company v. Dunn* and *Railroad Company v. Mississippi*, the records were entered, but no point was made of this in the opinions. We are aware that in *Removal Cases* (*supra*) and *Kern v. Huidekoper* (103 U. S. 485), it is said, in substance, that after the petition for removal and the entering of the record the jurisdiction of the circuit court is complete; but this evidently refers to the right of the circuit court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction. The state court must stop when the petition and security are presented, and the circuit court go on when the record is entered there, which is in effect docketing the cause. The question then is, whether, if the state court refuses to let go its jurisdiction and forces the petitioning party to trial, he must, in order to prevent his appearance from operating as a waiver, show to the state court that he is not in default in respect to entering the record and docketing the cause in the circuit court on the first day of the next term following the removal.

As has just been seen, when the state court has once lost its jurisdiction it is prohibited from proceeding until in some way jurisdiction has been restored. The right to remove is derived from a law of the United States, and whether a case is made for removal is a federal question. If, after a case has been made, the state court forces the petitioning party to trial and judgment, and the highest court of the state sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the state court, with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in *Gordon v. Longest*, *supra*. The petitioning party has the right to remain in the state court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the circuit court and require the adverse party to litigate with him there, even while the state court is going on. This was actually done in *Removal Cases*. When the suit is docketed in the cir-

court court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the circuit court, and direct that the suit be sent back to the state court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the circuit court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbitt v. Clark*, 103 U. S. 606. If, in such a case, we reverse the order of the circuit court to remand, our instructions to that court are, as in *Relfe v. Rundle* (*Id.* 222), to proceed according to law, as with a pending suit within its jurisdiction by removal. Should the petitioning party neglect to enter the record and docket the cause in the circuit court in time, we see no reason why his adversary may not go into the circuit court and have the cause remanded on that account. This being done, and no writ of error or appeal to this court taken, the jurisdiction of the state court is restored, and it may rightfully proceed as though no removal had ever been attempted.

It is contended, however, that if the petitioner fails to enter the record and docket the cause in the circuit court on the first day of the next term, the jurisdiction of that court is lost, and there can be no entry on a subsequent day. Such we do not understand to be the law. The petitioner must give security that he will enter the record on that day, but there is nothing in the act of congress which prohibits the court from allowing it to be entered on a subsequent day, if good cause is shown. In *Removal Cases* (*supra*) we used this language: "While the act of congress requires security that the transcript shall be filed on the first day of the next term, it nowhere appears that the circuit court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and re-

removal properly effected.” This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the Act of 1875, it was deemed advisable to confine our decision to the facts we had then before us. Now the question arises whether, if the petitioning party is kept by his adversary, and against his will, in the state court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter the cause in the circuit court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered. We have no hesitation in saying that in our opinion he can. As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the state court. The entering of the record in the circuit court after that was mere procedure, and in its nature not unlike the pleadings which follow service of process, the filing of which is ordinarily regulated by statute or rules of practice. The failure to file pleadings in time does not deprive the court of the jurisdiction it got through the service of process, but inexcusable delay may be good ground for dismissing the cause for want of prosecution. So here, if the petitioning party, without sufficient cause, fails to enter the record and docket the cause, the suit may be properly remanded for want of due prosecution under the removal; but if sufficient cause is shown for the delay, there is nothing in the statute to prevent the court from taking the case after the first day of the term and exercising its jurisdiction. Clearly, it is within the judicial discretion of every court, on good cause shown, to set aside a default in filing pleadings on a statutory rule-day, and allow the omission to be supplied. This case seems to be analogous to that. Undoubtedly promptness should be insisted on by the courts of the United States, and no excuse should be accepted for delay in entering a record after removal, unless it amounts to a clear justification of a waiver by the opposite party. It seems to us manifest that if the petitioning party is forced by his adversary to remain in the state court until he can, in a proper way, secure a reversal

of the order which keeps him there, the requirement of the law for entering the record in the circuit court at any time before the reversal actually takes place must be deemed to have been waived, and that for all the purposes of procedure in that court the time when the state court lets go its jurisdiction may be taken as the time according to which the docketing of the cause is to take place. Certainly the petitioning party ought not to be required to carry on his litigation in two courts at the same time. He may do so if he chooses; but if he elects to go on in the state court after his petition for removal is disregarded, and take his chances of obtaining a reversal of any judgment that may be obtained against him because he was wrongfully kept there, he ought not to be deprived of a trial in the proper jurisdiction because of the unwarranted act of his adversary, or of the state court.

The judgment of the court of appeals in each of these cases will be reversed, and the causes remanded to the supreme court of appeals of Virginia with directions to reverse the judgments of the circuit court of the county, and transmit the cases to that court with instructions to vacate all orders and judgments made or entered subsequently to the filing of the several petitions for removal and approval of the bonds, and proceed no further therein unless its jurisdiction be restored by the action of the circuit court of the United States or this court. *So ordered.*

C. & O. RY. v. COCKRELL.

Reported in 232 U. S. 146.
(1914.)

MR. JUSTICE VAN DEVANTER delivered the opinion of the court: This was an action begun in the circuit court of Clark county, Kentucky, by an administrator, to recover damages for the death of his intestate, the defendants being a railway company and the engineer and fireman of one of its trains which struck and fatally injured the intestate at or near a public crossing in Winchester, Kentucky. The administrator, engineer and fireman were citizens of Kentucky, and the railway company was a Virginia corporation. The latter in due time presented to the court a verified petition and proper

bond for the removal of the cause into the circuit court of the United States, but the court declined to surrender its jurisdiction and, over the company's protest, proceeded to a trial which resulted in a judgment against the company, and the court of appeals of the state affirmed the judgment, including the ruling upon the petition for removal. 144 Kentucky, 137.

The sole question for decision here is, whether it was error thus to proceed to an adjudication of the cause, notwithstanding the company's effort to remove it into the federal court.

Rightly understood and much abbreviated, the plaintiff's petition, after stating that the train was being operated by the engineer and fireman as employees of the railway company, charged that the injury and death of the intestate were caused by the negligence of the defendants (a) in failing to maintain an adequate lookout ahead of the engine, (b) in failing to maintain any lookout upon the left or fireman's side, from which the intestate went upon the track, (c) in failing to give any warning of the approach of the train, and (d) in continuing to run the train forward after it struck the intestate, and was pushing her along, until it eventually ran over and fatally injured her, when it easily could have stopped in time to avoid material injury. There was a prayer for a judgment against the three defendants for twenty-five thousand dollars, the amount of damages alleged.

The railway company's petition for removal, while not denying that the engineer and fireman were in the employ of the company or that they were operating the train when it struck and injured the intestate, did allege that the charges of negligence (all being specifically repeated) against the defendants were each and all "false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder" of the engineer and fireman with the railway company and of "thereby fraudulently depriving" the latter of its right to have the action removed into the federal court, and that none of the charges of negligence on

the part of the engineer or fireman could be sustained on the trial.

It will be perceived that but for the joinder of the two employees as codefendants with the railway company, the latter undoubtedly would have been entitled to remove the cause into the federal court on the ground of diverse citizenship, there being the requisite amount in controversy; and that the railway company attempted in the petition for removal to overcome the apparent obstacle arising from the joinder. Whether the petition was sufficient in that regard is the subject of opposing contentions.

The right of removal from a state to a federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes, and this must be done by a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, in order that the court may draw the proper conclusion from all the facts and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 202; *Carson v. Dunham*, 121 U. S. 421, 426; *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244; *Chesapeake & Ohio Railway Co. v. Powers*, 169 U. S. 92, 101.

A civil case, at law or in equity, presenting a controversy between citizens of different states and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the state in which the case is brought; and this right of removal can not be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. *Louisville & Nashville R. R. Co. v. Wangelin*, 132 U. S. 599, 601; *Alabama Southern Railway Co. v. Thompson*, 200 U. S. 206, 218; *Wecker v. National Enam-*

eling Co., 204 U. S. 176; *Illinois Central R. R. Co. v. Sheegog*, 215 U. S. 308, 316. So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet "fraudulent" to the joinder will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in *Wecker v. National Enameling Co.*, *supra*. See *Illinois Central R. R. Co. v. Sheegog*, *supra*; *Chicago, Rock Island & Pacific Railway Co. v. Dowell*, 229 U. S. 102, 114.

Here the plaintiff's petition, as is expressly conceded, not only stated a good cause of action against the resident defendants, but tested by the laws of Kentucky, as it should be, stated a case of joint liability on the part of all the defendants. As thus stated the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right. And while the plaintiff's statement was not conclusive upon the railway company, it did operate to lay upon the latter, as a condition to a removal, the duty of showing that the joinder of the engineer and fireman was merely a fraudulent device to prevent a removal. Of course, it was not such unless it was without any reasonable basis.

Putting out of view, as must be done, the epithets and mere legal conclusions in the petition for removal, it may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, but it did not show a fraudulent joinder of the engineer and fireman. With the allegation that they were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman. As no negligent act or omission personal to the railway company was charged and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter,

the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill-founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for removal was not such as to require the state court to surrender its jurisdiction.

While this conclusion requires an affirmance of the judgment, we would not be understood as approving the reasoning upon which the action of the trial court was sustained by the court of appeals of the state. That court, apparently assuming that the petition for removal contained a sufficient showing of a fraudulent joinder, held that the questions of fact arising upon the petition were open to examination and determination in the state court, and that no error was committed in refusing to surrender jurisdiction, because upon the subsequent trial the evidence indicated that the showing in the petition was not true as to the fireman. In so holding the court of appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the federal court, and that the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. *Stone v. South Carolina*, 117 U. S. 430, 432; *Crehore v. Ohio & Mississippi Ry. Co.*; *Illinois Central R. R. Co. v. Sheegog*, and *Chicago, Rock Island & Pacific Ry. Co. v. Dowell*, *supra*. In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the state court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the federal court, as was done in *Wecker v. National Enameling Co.*, *supra*. And had the state court refused to give effect

to the petition, it and the bond being sufficient, the railway company might have obtained a certified transcript of the record, resorting if necessary to a writ of *certiorari* for that purpose, and, upon filing the transcript in the federal court, might have invoked the authority of the latter to protect its jurisdiction by enjoining the plaintiff from taking further proceedings in the state court, unless the cause should be remanded. *Traction Co. v. Mining Co.*, 196 U. S. 239, 245; *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U. S. 207, 217, 219; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U. S. 191, 195; *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494. *Judgment affirmed.*

(bb) In the federal court.

C. & O. RY. v. McCABE.

Reported in 213 U. S. 207.

(See above, p. 493.)

On amendment, see *Kinney v. Columbia Sav. & Loan Co.*, 191 U. S. 78, permitting amendment in the circuit court of United States, of petition for removal to show requisite diversity of citizenship.

See *Ostrander v. Blandin*, 211 Fed. R. 733, where amendment of bill of complaint was permitted after removal, to show citizenship of the parties and jurisdictional amount in controversy.

Amendment to show diversity of citizenship is now permitted in a reviewing court. 38 Stat. L. 956, Chapter 90, Act of March 3, 1915. See Judicial Code, Section 274c.

(cc) Remand.

EX PARTE WISNER.

Reported in 203 U. S. 449.

(1906.)

ABRAM C. Wisner, a citizen of the state of Michigan, commenced an action at law, on February 17, A. D. 1906, in the circuit court in and for the city of St. Louis and state of Missouri, against John D. Beardsley, a citizen of the state of Louisiana, by filing a petition, together with an affidavit, on which that court issued a writ of attachment, in the usual form, directed to the sheriff of St. Louis. The sheriff returned

no property found, but that he had garnisheed the Mississippi Valley Trust Company, a corporation of Missouri, and also had served Beardsley with summons in the city of St. Louis.

Saturday, March 17, A. D. 1906, the garnishee answered, and on the same day Beardsley filed his petition to remove the action from the state court into the circuit court of the United States for the eastern division of the eastern district of Missouri, on the ground of diversity of citizenship, together with the bond required in such case. An order of removal was thereupon entered by the state court and the transcript of record was filed in the circuit court of the United States.

Monday, March 19, Wisner moved to remand in these words: "Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the circuit court of the city of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the state of Michigan and the defendant a citizen and resident of the state of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court can not acquire jurisdiction by removal."

The motion was heard and denied April 2, 1906, the circuit court referring to *Foulk v. Gray*, 120 Fed. Rep. 156, and *Rome Petroleum Company v. Hughes*, 130 Fed. Rep. 585, as representing the different views of the courts below on the question involved.

On April 23, Wisner applied to this court for leave to file a petition for mandamus as well as a petition for prohibition, leave was granted, and rules entered returnable May 14, 1906, and the cases submitted on the returns to the rules.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court: By Article III of

the constitution the judicial power of the United States was “vested in one supreme court, and in such inferier courts as the congress may from time to time ordain and establish.”

And the judicial power was extended “to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects.”

The supreme court alone possesses jurisdiction derived immediately from the constitution, and of which the legislative power can not deprive it, *United States v. Hudson*, 7 Cranch, 32; but the jurisdiction of the circuit courts depends upon some act of congress. *Turner v. Bank*, 4 Dall. 8, 10; *McIntire v. Wood*, 7 Cranch, 504, 506; *Shelden v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U. S. 165, 167. In the latter case we said: “The use of the word ‘controversies’ as in contradistinction to the word ‘cases,’ and the omission of the word ‘all’ in respect of controversies, left it to congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done.”

The first section of the Act of March 1, 1887, 24 Stat. c. 373, p. 552, as corrected by the Act of August 13, 1888, 25 Stat. c. 366, p. 433, amended Sections 1, 2 and 3 of the Act of Congress of March 3, 1875, 18 Stat. c. 137, p. 470, as follows:

“That the circuit court of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority,

or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; * * * But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * * .”

“SECTION 2. That any suit of a civil nature, at law or in equity arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being nonresidents of that state; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made

to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, * * *

“Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.”

SECTION 3, as amended, provided for petition and bond for “the removal of such suit into the circuit court to be held in the district where such suit is pending, * * * ”

As it is the nonresident defendant alone, who is authorized to remove, the circuit court for the proper district is evidently the circuit court of the district of the residence of the plaintiff.

And it is settled that no suit is removable under Section 2 unless it be one that plaintiff could have brought originally in the circuit court. *Tennessee v. Bank*, 152 U. S. 454; *Mexican National Railroad v. Davidson*, 157 U. S. 201; *Cochran v. Montgomery County*, 199 U. S. 260, 272.

In *Shaw v. Quincy Mining Company*, 145 U. S. 44, 146, Mr. Justice Gray, speaking for the court, in disposing of the question whether, under Section 1, “a corporation incorporated in one state of the Union, and having a usual place of business in another state in which it has not been incorporated, may be sued in a circuit court of the United States held in the latter state, by a citizen of a different state,” said:

“This question, upon which there has been a diversity of opinion in the circuit courts, can be best determined by a review of the acts of congress, and of the decisions of this court, regarding the original jurisdiction of the circuit courts of the United States over suits between citizens of different states.

“In carrying out the provision of the constitution which declares that the judicial power of the United States shall extend to controversies ‘between citizens of different states,’ congress, by the Judiciary Act of September 24, 1789, c. 20, Section 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, ‘between a citizen of the

state where the suit is brought and a citizen of another state,' and provided that 'no civil suit shall be brought against an inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. 78, 79."

And, after observations in relation to the use of the word "inhabitant" in that act, and referring to the Act of May 4, 1858, 11 Stat. c. 27, p. 272, Section 1, and the Act of March 3, 1875, 18 Stat. 470, c. 137, Section 1, Mr. Justice Gray thus continued:

"The Act of 1887, both in its original form, and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction of either is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the clauses mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' *McCormick Company v. Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467.

"As to natural persons, therefore, it can not be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof,

is that the phrase 'district of the residence of,' a person is equivalent to 'district whereof he is an inhabitant,' and can not be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

In short, the Acts of 1887-1888 restored the rule of 1789, as we stated in *Cochran v. Montgomery County*, *supra*.

In the present case neither of the parties was a citizen of the state of Missouri, in which state the suit was brought, and, therefore, it could not have been brought in the circuit court in the first instance.

Wisner did not, of choice, select the state court as the forum, since he could not have sued in the circuit court under the act, because neither he nor Beardsley was a citizen of Missouri. And the question of jurisdiction relates to the time of commencing the suit.

But it is contended that Beardsley was entitled to remove the case to the circuit court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the circuit court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of congress by the Act of 1887 to contract the jurisdiction of the circuit courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties. As we have heretofore remarked: "Jurisdiction as to the subject-matter may be limited in various ways as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on." *Louisville Trust Co. v. Comingore*, 184 U. S. 18, 25.

In *Central Trust Company v. McGeorge*, 151 U. S. 129, it was assumed, however, that the requirement that no suit should be brought in any other district than that of the plaintiff or of the defendant might be waived, where neither resided therein, because in that case the nonresident plaintiff had sued in the circuit court and the nonresident defendant had answered on the merits, which showed the consent of both parties and not unnaturally led to the result announced, while in this case there was no such consent. As was stated by Mr. Justice Brewer, in *Kinney v. Columbia Savings & Loan Association*, 191 U. S. 78, 82: "A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court." When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own. But plaintiff, in resisting the application and moving to remand, denied the jurisdiction of the circuit court. In *St. Louis, etc., Railway Co. v. McBride*, 141 U. S. 127, where the plaintiffs were citizens and residents of the western district of Arkansas, and commenced their action in the circuit court of the United States for the district, and the defendant was a corporation and citizen of the state of Missouri, it was held that, as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district." And there are many other cases to the same effect.

Our conclusion is that the case should have been remanded, and as the circuit court had no jurisdiction to proceed, that mandamus is the proper remedy. Mandamus awarded; petition for prohibition dismissed.

In *re Moore*, 209 U. S. 490, was a case in which plaintiff Moore was an infant, of Illinois, suing, by his next friend of Missouri, in a Missouri state court, a railway company of Kentucky; defendant removed on ground of diversity of citizenship. Plaintiff, in the federal court, amended his petition, and by stipulation defendant was given time to plead, and several stipulations were subsequently entered into for continuances. Later a motion to remand was overruled, and upon application to supreme court for mandamus, the writ was denied, on the ground that the plaintiff had waived any objection he might have had to the jurisdiction of the federal court. In *re Wisner* is explained and limited.

In *Western Loan & Savings Company v. Butte Company*, 210 U. S. 368, the plaintiff, of Utah, brought suit in the United States circuit court for the district of Montana against the defendant, of New York; and upon dismissal by the circuit court the case was brought on error to the supreme court, where the sole question considered was whether the defendant waived objection to the jurisdiction, holding that by demurring to the sufficiency of the complaint defendant had waived the jurisdiction and the circuit court erred in dismissing. *In re Wisner* is stated as to this point to have been overruled in *In re Moore*, above.

In *L. & N. Ry. Co. v. W. U. Tel. Co.*, 218 Fed. 91, plaintiff of one federal judicial district of Kentucky, brought suit in the state court in another district of Kentucky, against defendant, of the state of New York, and defendant removed to the United States district court in said other district. Upon motion to remand the court, D. J. Cochran, declined to follow *Ex parte Wisner*, and upon an exhaustive review of the cases, and statutes both of 1888 and 1911, denied the motion, saying at pp. 106 and 107:

"I can not, however, quit this part of the discussion without taking notice of the fact that the jurisdiction of the federal court in such a case as we have here is to no extent dependent upon the doctrine of waiver. In some of the cases cited in the early part of this opinion as deciding that suit between citizens of different states brought in a state of which neither party is a resident, much is made of that doctrine as sustaining the jurisdiction.

"This is notably true of the cases of *Creagh v. Equitable Life Assur. Soc.* (C. C.), 83 Fed. 849, and *Cowell v. City Water Supply Co.* (C. C.), 96 Fed. 769. And the decision in the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, was based solely upon waiver.

"Waiver, according to 40 Cyc., p. 252, is defined as follows: 'The act of waiving or not insisting on some right, claim, or privilege.'

"The plaintiff, in bringing such a suit in the state court, does what he has a perfect right to do, because congress has never denied him that right or questioned it to the slightest extent. Its requirement that such a suit shall be brought in the district of the residence of either the plaintiff or defendant relates to the bringing of it in the federal court, and not in the state court. On the contrary, by providing for the removal of such a suit into the federal court, it presupposes that the right may be exercised. Defendant, therefore, in removing the suit into the federal court, does not waive anything. He does not thereby fail to insist on any right, claim, or privilege. He merely exercises the right conferred on him by the removal statute to remove the suit from the state court to the federal court. Nor can it be said that, if the plaintiff makes no objection to the removal, he waives anything. He has no right to object to the removal. The suit is one coming within the removal statute, and hence the defendant has the right to remove it. It is thus seen that the jurisdiction of the federal court on removal of such a suit is to no extent dependent on the waiver of either party of any right, claim or privilege."

BLAKE v. McKIM.

Reported in 103 U. S. 336.

(See above, p. 449.)

GERMAN NATIONAL BANK v. SPECKERT.

Reported in 181 U. S. 405.

(1901.)

MR. JUSTICE GRAY delivered the opinion of the court: This was a bill in equity, commenced in a court of the state of Kentucky, and removed, on petition of the defendant, into the circuit court of the United States for the district of Kentucky. The circuit court of the United States denied a motion to remand the case to the state court, 85 Fed. Rep. 12, and afterwards dismissed the bill upon its merits. The plaintiff appealed to the circuit court of appeals, which reversed the decree and ordered the circuit court to remand the case to the state court. 98 Fed. Rep. 151; 38 C. C. A. 682. From the order of the circuit court of appeals the plaintiffs appealed to this court.

In *Railroad Co. v. Wiswall* (1874), 23 Wall. 507, a case was removed from a state court into a circuit court of the United States; the circuit court, being satisfied that it had no jurisdiction, ordered the case to be remanded to the state court; and a writ of error to review the order remanding it was dismissed by this court, upon the ground that "the order of the circuit court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

By the Act of March 3, 1875, c. 137, Section 5, it was provided that an order of the circuit court, dismissing or remanding a cause to the state court, should be reviewable by this court on writ of error or appeal. 18 Stat. 472. Under that statute, many cases were brought to this court by appeal or writ of error for the review of such orders.

But by Section 6 of the Act of March 3, 1887, c. 373, as reenacted by the Act of August 13, 1888, c. 866, that provision was expressly repealed; and by Section 2 it was enacted that whenever the circuit court of the United States should decide that a cause had been improperly removed, and order it to

be remanded to the state court from which it came, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553, 555; 25 Stat. 435, 436.

Under that statute, it has been constantly held that this court has no power to review by appeal or writ of error an order of a circuit court of the United States remanding a case to a state court.

In the first case Chief Justice Waite said: "It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." *Morey v. Lockhart* (1887), 123 U. S. 56. And it was held that the act prohibited a writ of error after that statute took effect to review an order of remand made while the Act of 1875 was in force. *Sherman v. Grinnell* (1887), 123 U. S. 679.

By the Act of February 25, 1889, c. 236, it is provided that "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States, in which there shall have been a question involving the jurisdiction of the court," the losing party should be entitled to an appeal or writ of error to this court, without reference to the amount of the judgment, but limited, when that amount did not exceed five thousand dollars, to the question of jurisdiction. 25 Stat. 693. It was held that this act did not authorize an appeal from an order of the circuit court of the United States remanding a case to the state court for want of jurisdiction, because "the words 'a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the circuit court proceeded." *Richmond & Danville Railroad v. Thouron* (1890), 134 U. S. 45. A similar decision was made in *Gurnee v. Patrick County* (1890), 137 U. S. 141.

In the case of *In re Pennsylvania Co.* (1890), 137 U. S. 451, it was held that the Acts of 1887 and 1888 took away the remedy by mandamus, as well as that by writ of error or appeal, in the case of an order of remand; and Mr. Justice Bradley, in delivering judgment, after quoting Section 2 of those acts, said: "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 454. * * * (Other cases are discussed and the court then proceeds:)

In the present case, the remand to the state court was denied by the circuit court of the United States, but, on appeal from its decree dismissing the bill, was ordered by the circuit court of appeals.

If the circuit court had ordered the case to be remanded, its order could not, according to the decisions above cited, have been reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the state court.

It would be an extraordinary result if, while an order of remand by the circuit court, of its own motion, is not subject

to review in any form, an order of remand by that court, by direction of the circuit court of appeals, were subject to a further appeal to this court.

The appeal in this case is taken under the last paragraph of Section 6 of the Act of March 3, 1891, c. 517, by which "in all cases not hereinbefore in this section made final," and when the matter in controversy exceeds one thousand dollars, there is of right a review of the judgment of the circuit court of appeals by this court on appeal or writ of error.

Such appeal or writ of error, of course, can only be taken from a final judgment. But an order of remand is not a final judgment, according to the cases above cited, especially *Railroad Co. v. Wiswall*, *Richmond & Danville Railroad v. Thouron*, *Chicago Railway v. Roberts*, and *Missouri Pacific Railway v. Fitzgerald*. Therefore no appeal lies from the order of remand. *Appeal dismissed for want of jurisdiction.*

The various removal statutes will be found as follows:

REVISED STATUTES UNITED STATES, SECTION 639.

- 1 Statutes at Large, p. 79 (24 September, 1789).
- 14 Statutes at Large, p. 306 (27 July, 1866).
- 14 Statutes at Large, p. 568 (2 March, 1867).
- 18 Statutes at Large, pp. 470, 471, 472, 473 (3 March, 1875).

REVISED STATUTES UNITED STATES, SECTION 640.

Against United States Corporation:

- 15 Statutes at Large, 227 (27 July, 1868).
- 14 Statutes at Large, 306 (27 July, 1866).

REVISED STATUTES UNITED STATES, SECTION 641.

Persons denied civil rights:

- 12 Statutes at Large, 756 (3 March, 1863).
- 14 Statutes at Large, 27 (9 April, 1866).
- 14 Statutes at Large, 46 (11 May, 1866).
- 16 Statutes at Large, 144 (31 May, 1870).

REVISED STATUTES UNITED STATES, SECTION 645.

Copies of records in state court refused:

- 4 Statutes at Large, 634 (2 March, 1833).
- 16 Statutes at Large, 439 (28 February, 1871).

Attachments, injunctions, etc., to remain in force.

REVISED STATUTES UNITED STATES, SECTION 646.

See above for Session Law citations.

Conflicting land grants.

REVISED STATUTES UNITED STATES, SECTION 647.

See above for Session Law citations.

And see:

24 Statutes at Large, 552, *et seq.* (3 March, 1887).

25 Statutes at Large, 433, *et seq.* (13 August, 1888).

36 Statutes at Large, 1094, *et seq.* (March, 1911).

OUTLINE OF REMOVAL STATUTES OF 1911.

1. Nature—Involving federal question and \$3,000.
- 1-A. By whom—Defendant—All must join.
- 1-B. When—Before answer day.
- 1-C. How—Petition and bond in state court—Verification and notice.
- 1-D. Subsequent proceedings in state court. } Duty to proceed no farther.
- 1-E. How record transferred. } State court orders clerk to certify; if clerk refuses or neglects,
a. File affidavit in United States district court.
b. *Certiorari* to state court.
c. Penalty.
- 1-F. Subsequent proceedings in United States district court. } Plead in thirty days; proceed as if originally begun in United States district court.
a. Attachments, bonds, etc., continue subject to United States district court.
b. Remand if not removable; no appeal from, or
c. Dismiss.

In any other case of civil nature in law or equity wherein United States district court has jurisdiction under Section 24, Judicial Code (generally).

2. Diversity of citizenship and \$3,000.
- 2-A. By nonresident defendant.
- 2-B. Before answer day.
- 2-C. Petition and bond to state court verified and notice.
- 2-D. Ditto 1-D.
- 2-E. Ditto 1-E.
- 2-F. Ditto 1-F.
3. Diversity of citizenship—Separable controversy and \$3,000.
- 3-A. By nonresident defendant.
- 3-B. Before answer day.
- 3-C. Petition and bond—Verified—Notice.
- 3-D. Ditto 1-D.
- 3-E. Ditto 1-E.
- 3-F. Ditto 1-F.

4. Diversity of citizenship and local prejudice and \$3,000.
 - 4-A. By nonresident defendant.
 - 4-B. Anytime before trial.
 - 4-C. Petition and affidavit in United States court.
 - 4-D. Ditto 1-D.
 - 4-E. Ditto 1-E.
 - 4-F. Ditto 1-F.
5. Conflicting land grant and \$3,000.
 - 5-A. By either plaintiff or defendant.
 - 5-B. Before trial.
 - 5-C. Petition and bond in state court.
 - 5-D. Ditto 1-D.
 - 5-E. Ditto 1-E.
 - 5-F. Ditto 1-F.
6. Civil or criminal action against one who is denied equal civil rights, or against federal officer acting under any federal law.
 - 6-A. By defendant.
 - 6-B. Before trial.
 - 6-C. Petition in state court—*Habeas corpus* when necessary.
 - 6-D. Shall cease and not be resumed except where petitioner neglects or refuses to file certified record.
 - 6-E. Ditto 1-E, and
 - d. Petitioner may docket case in United States district court, and plaintiff required to file original petition, etc., in case, or
 - e. Petitioner at fault, no record transferred—Suit in state court may continue, or
 - f. Plaintiff required to file copy of petition or of bill of complaint, or
 - g. Requirement to plead *de novo*.
 - 6-F. As if originally filed in United States district court, and 1-F a, b, c.
7. Suit against United States revenue officer, or sergeant-at-arms of congress, etc.
 - 7-A. By defendant.
 - 7-B. Before trial.
 - 7-C. Petition and certificate in United States district court—*Habeas corpus* when necessary.
 - 7-D. Void.
 - 7-E. Ditto 1-E and 6-E, d, f, g.
 - 7-F. Ditto 6-F and 1-F, a, b, c.
8. Alien sues United States officer, nonresident.
 - 8-A. Ditto 7-A.
 - 8-B. Ditto 7-B.
 - 8-C. Ditto 7-C, except no *habeas corpus*.
 - 8-D. Void.
 - 8-E. Ditto 7-E.
 - 8-F. Ditto 7-F.

2. THE SUPREME COURT.

a. Nature and extent of its original jurisdiction.

MARBURY v. MADISON.

Reported in 1 Cranch, 137.

(1803.)

At the last term, viz., December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper, by their counsel, Charles Lee, Esq., late attorney general of the United States, severally moved the court for a rule on James Madison, secretary of state of the United States, to show cause why a mandamus should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the District of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate, for their advice and consent, to be appointed justices of the peace of the District of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president, appointing them justices, etc., and that the seal of the United States, was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory explanation has not been given, in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate, for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate. Whereupon, a rule was laid, to show cause on the fourth day of this term; this rule having been duly served.

Opinion of court delivered by CHIEF JUSTICE MARSHALL:

* * * This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court?

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power, it is declared, that "the supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited: provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the su-

preme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It can not be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or

to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been created. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the

United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and no such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be

looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that "no tax or duty shall be laid on articles exported from any state." Suppose, a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here, the language of the constitution is addressed especially to the court. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will

administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ——, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.” Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and can not be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. *The rule must be discharged.*

UNITED STATES v. YALE TODD.

In Supreme Court of the United States.

(Unreported, but by order of court made a note accompanying the report of *United States v. Ferreira*, 13 Howard, 40, p. 52.)

SINCE the foregoing opinion was delivered, the attention of the court has been drawn to the case of the *United States v. Yale Todd*, which arose under the Act of 1792, and was decided in the supreme court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to Hayburn’s case. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in Yale Todd’s case is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The second, third and fourth sections of the Act of 1792, were repealed at the next session of congress by the Act of February 28, 1793. It was these three sections that gave rise to the questions stated in the note to Hayburn's case. The repealing act providing another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the third section it saved all rights to pensions which might be founded "upon any legal adjudication," under the Act of 1792, and made it the duty of the secretary of war, in conjunction with the attorney general, to take such measures as might be necessary to obtain an adjudication of the supreme court, "on the validity of such rights, claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the Act of 1792, immediately after its passage and before it was repealed. And the saving and proviso, in the Act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the justices, and was introduced for the purpose of having it determined, whether under the act conferring the power upon the circuit courts, the judges of those courts when refusing for the reasons assigned by them to act as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this act of congress, the case of Yale Todd was brought before the supreme court, in an amicable action, and upon a case stated in February term, 1794.

The case was docketed by consent, the United States being plaintiff and Todd the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit*.

The case as stated, admitted that on the 3d of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing and Richard Law, then being judges of the circuit

court held at New Haven, for the district of Connecticut, then and there sitting, and claiming to be commissioners under the Act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the circuit court, and then and there sitting at New Haven, in and for the Connecticut district, proceeded as commissioners designated in the said act of congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two-thirds of his former monthly wages, which they understood to have been eight dollars and one-third per month, and the sum of one hundred and fifty dollars for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the secretary of war, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the circuit court sitting as commissioners, and not as a circuit court, had power and authority by virtue of said act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy-two dollars and ninety-one cents, and six cents cost.

The case was argued by Bradford, attorney general for the United States, and Hillhouse for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justices Cushing, Wilson, Blair, and Paterson, were present at the decision. No opinion was filed stating the grounds of the decision. Nor is any dissent from the judgment entered on the record. It would seem, therefore to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that

the power given in the Act of 1792 to the circuit court as a court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the supreme court of that day in the note to Hayburn's case, and in the case of the *United States v. Todd*, is this:

1. That the power proposed to be conferred on the circuit courts of the United States by the Act of 1792, was not judicial power within the meaning of the constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the act of congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States.

The case of *Todd* was docketed by consent in the supreme court; and the court appears to have been of opinion that the Act of Congress of 1793, directing the secretary of war and attorney general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's* case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress can not enlarge it. In all other cases its power must be appellate.

HAYBURN'S CASE.

Reported in 2 Dallas, 409.

(1792.)

SEE the same case, *post*, p. 415, and 3 Dall. 1, as well as on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.

See an act passed the 28th of February, 1793 (1 U. S. Stat. 324). As the reasons assigned by the judges, for declining to execute the first act of congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

The circuit court for the district of New York (consisting of Jay, Chief Justice, Cushing, Justice, and Duane, District Judge), proceeded, on the 5th of April, 1791, to take into consideration the act of congress entitled, "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed.

"That by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decision of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary of war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purpose mentioned in it, by official instead of personal

description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office. That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners.

“That as the legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed. That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed, as commissioners, to execute the business of this act in the same court room, or chamber.”

(The same view as to the absence of judicial authority was expressed by the circuit courts for the districts of Pennsylvania and North Carolina.)

The principles of these early cases were applied in *United States v. Ferreira*, 13 How. 40, involving Spanish claims protected by treaty of 1819; in *Gordon v. United States*, 2 Wall. 561, involving appellate jurisdiction of the supreme court from the court of claims (see opinion of C. J. Taney in 117 U. S. 697), inasmuch as by the act establishing the court of claims no power to execute its judgment was given to the supreme court on appeal. And in *Muskrat v. United States*, 219 U. S. 346, involving a statute authorizing a proceeding in the court of claims and on appeal in the supreme court, to determine the constitutionality of certain statutes of the United States. Justice Day renders the opinion and makes an exhaustive survey of the cases, and at page 360 says:

“Applying the principles thus long settled by the decisions of this court to the act of congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the Act of July 11, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the court of claims to determine the validity of acts of congress passed since the Act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of

Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said Act of July 1, 1902.

"The jurisdiction was given for that purpose first to the court of claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the court of claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the attorney general be charged with the defense of the suits.

"It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of congress. Is such a determination within the judicial power conferred by the constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law."

In *B. & O. Ry. v. Interstate Com. Comn.*, 215 U. S. 216, it was held that a circuit court of the United States can **not** certify the whole case to the United States supreme court for opinion, under a statute providing for certifying questions of law, since such proceeding would be bestowing original jurisdiction on the supreme court.

Ex parte Vallandigham, 1 Wall. 243, 252, to the effect that the original jurisdiction of the supreme court as expressed in the constitution can not be enlarged by congress.

b. Suit by United States against a state.

UNITED STATES v. TEXAS.

Reported in 143 U. S. 621.

(1892.)

MR. JUSTICE HARLAN delivered the opinion of the court: This suit was brought by original bill in this court pursuant to the Act of May 2, 1890, providing a temporary government for the territory of Oklahoma. The twenty-fifth section re-

cites the existence of a controversy between the United States and the state of Texas as to the ownership of what is designated on the map of Texas as Greer county, and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the attorney general of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the state of Texas, setting forth the title of the United States to the country lying between the north and south forks of the Red river where the Indian territory and the state of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the state of Texas as within its boundary. 26 Stat. 81, 92, c. 182, Section 25.

The state of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the constitution and laws of the United States; that it is not competent for the general government to bring suit against a state of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the state, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the Act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void.

The necessity of the present suit as a measure of peace between the general government and the state of Texas, and the nature and importance of the questions raised by the demurrer, will appear from a statement of the principal facts disclosed by the bill and amended bill. * * *

In view of these cases, it can not, with propriety, be said that a question of boundary between a territory of the United States and one of the states of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question, therefore, is whether this court can, under the constitution, take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by argument, in some form, between the United States and that state. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suits in one of the courts of Texas—that state consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted, both by the letter and spirit of the constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states. They must be enforced, if at all, in the state tribunals." Story Const., Section 1674. The second alternative, above mentioned, has no place in our constitutional system, and can not be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more states, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the states of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the state of North Carolina, upon certain bonds issued by that state. The state appeared, the case was determined here upon its merits, and judgment was rendered for the state. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a state. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make." Article III, Section 2. "The judicial power of the

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Eleventh amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens v. Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the constitution, the judicial power of the United States extends. That a circuit court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Revised Statutes, Section 687; Act of September 24, 1789, c. 20, Section 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why, then, may not this court take original cognizance of the present suit involving a question of boundary between a territory of the United States and a state?

The words, in the constitution, "in all cases * * * in which a state shall be party, the supreme court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states, even

where such suits arise under the constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against states. *Hans v. Louisiana*, 134 U. S. 1, and authorities there cited; *North Carolina v. Temple*, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a state is a party, and in which, also, the opposite party is another state of the Union or a foreign state. This can not be correct, for it must be conceded that a state can bring an original suit in this court against a citizen of another state. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits, the correct decision of which depends upon the constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the constitution. That instrument extends the judicial power of the United States “to all cases,” in law and equity, arising under the constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction “in all cases” “in which a state shall be party,” that is, in all cases mentioned in the preceding clause in which a state may, of right, be made a party defendant, as well as in all cases in which a state may, of right, institute a suit in a court of the United States. The present case is of the former class. We can not assume that the framers of the constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the

people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the states, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state.

Mr. Justice Bradley, speaking for the court, in *Hans v. Louisiana*, 134 U. S. 1, 15, referred to what had been said by certain statesmen at the time the constitution was under submission to the people, and said: "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. * * * The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states." That case, and others in this court relating to the suability of states, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The

submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The states of the Union have agreed, in the constitution, that the judicial power of the United States shall extend to all cases arising under the constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a state shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infringing, in either case, upon the sovereignty, is with the consent of the state sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court has jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of congress requiring the institution of this suit in equity is unconstitutional and void as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in *Fowler v. Lindsey*, 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: "I will not say that a state could sue at

law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The state of New York might, I think, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries." But the question arose directly in *Rhode Island v. Massachusetts*, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two states. The court said: "No court acts differently in deciding on boundary between states, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accidents, fraud or time or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a state is and shall be." When that case was before the court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign states, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the court determined to frame their proceedings according to those which had been adopted in the English court, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this principle, it was then decided, that the rules and practice of the court of chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the cor-

rectness of this decision." 14 Pet. 210, 256. The above cases, *New Jersey v. New York*, *Missouri v. Iowa*, *Florida v. Georgia*, *Alabama v. Georgia*, *Virginia v. West Virginia*, *Missouri v. Kentucky*, *Indiana v. Kentucky*, and *Nebraska v. Iowa*, were all original suits in equity in this court, involving the boundary of states. In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two states, there can be no objection to the present suit as being in equity and not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer county. It involved the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity. *Demurrer overruled.*

MR. CHIEF JUSTICE FULLER, with whom concurred Mr. Justice Lamar, dissenting: Mr. Justice Lamar and myself are unable to concur in the decision just announced.

The court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.

The judicial power extends to "controversies between two or more states;" and "between a state or the citizens thereof, and foreign states, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a state may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

In accord, see *United States v. Michigan*, 190 U. S. 379, 396.

But supreme court has no jurisdiction of suit by state against United States, without consent to be sued. *Kansas v. United States*, 204 U. S. 331.

As to the proceedings in the supreme court in a case where a state is a party, see *Grayson v. Virginia*, 3 Dallas, 320; *Rhode Island v. Massachusetts*, 14 Peters, 210, 257.

c. Suit between states.

NEW JERSEY v. NEW YORK.

Reported in 5 Peters, 284.

(1831.)

MARSHALL, Chief Justice, delivered the opinion of the court: This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states.

The constitution of the United States declares, that "the judicial power shall extend to controversies between two or more states." It also declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. The act to establish the judicial courts of the United States, Section 13, enacts, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." It also enacts, Section 14, "that all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." By the seventeenth section,

it is enacted, "that all the said courts of the United States shall have power to make and establish all necessary rules for the ordinary conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." "An act to regulate processes in the courts of the United States" was passed at the same session with the Judiciary Act, and was depending before congress at the same time. It enacts, "all writs and processes issuing from the supreme or a circuit court shall bear *teste*," etc. This act was rendered perpetual in 1792. The first section of the Act of 1792 repeats the provision respecting writs and processes, issuing from the supreme or a circuit court. The second continues the form of writs, etc., and the forms and modes of proceeding in suits at common law, prescribed in the original acts, and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same.

At a very early period in our judicial history, suits were instituted in this court against states; and the questions concerning its jurisdiction and mode of proceeding were necessarily considered. So early as August, 1792, an injunction was awarded, at the prayer of the state of Georgia, to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia, under her acts of confiscation. This was an exercise of the original jurisdiction of the court, and no doubt of its propriety was ever expressed. In February, 1793, the case of *Oswald v. State of New York* came on. This was a suit at common law. The state not appearing on the return of the process, proclamation was made, and the following order entered by the court: "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be

entered by default against the said state." At the same term, the case of *Chisholm's Executors v. State of Georgia* came on, and was argued for the plaintiffs, by the then attorney general, Mr. Randolph. The judges delivered their opinions *seriatim*; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction of the court; and that the process served on the governor and attorney general of the state was sufficient. Mr. Justice Iredell thought an act of congress necessary to enable the court to exercise its jurisdiction. After directing the declaration to be filed, and copies of it to be served on the governor and attorney general of the state of Georgia, the court ordered, "that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of the next term, judgment by default shall be entered against the said state." In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry was awarded, but the eleventh amendment to the constitution prevented its execution.

Grayson v. State of Virginia, 3 Dall. 320, was a bill in equity. The subpoena having been returned executed, the plaintiff moved for a *distringas*, to compel the appearance of the state. The court postponed its decision on the motion, in consequence of a doubt, whether the remedy to compel the appearance of the state should be furnished by the court itself, or by the legislature. At a subsequent term, the court, "after a particular examination of its power," determined that though "the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity," "still it was thought that we are also authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration and control of the legislature. We have, therefore, agreed to make the following general orders: "1. Ordered, that the process of subpoena issuing out of this court, in any suit in equity, shall be served on the defendant, sixty days before the return-day of the said process; and further, that if the defendant, on such service of the subpoena,

shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." 3 Dall. 320.

In *Huger v. State of South Carolina*, the service of the subpoena having been proved, the court determined, that the complainant was at liberty to proceed *ex parte*. He accordingly moved for and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. 371. *Fowler v. Lindsey*, and *Fowler v. Miller*, 3 Dall. 411, were ejectments depending in the circuit court for the district of Connecticut, for lands over which both New York and Connecticut claimed jurisdiction. A rule to show cause why these suits should not be removed into the supreme court by *certiorari*, was discharged, because a state was neither nominally nor substantially a party. No doubt was entertained of the propriety of exercising original jurisdiction, had a state been a party on the record. In consequence of the rejection of this motion for a *certiorari*, the state of New York, in August term 1799, filed a bill against the state of Connecticut (4 Dall. 1), which contained an historical account of the title of New York to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of November, 1783, between the two states, on the subject; and prayed a discovery, relief and injunction to stay the proceedings in the ejectments depending in the circuit court of Connecticut. The injunction was, on argument, refused, because the state of New York was not a party to the ejectments, nor interested in their decision.

It has, then, been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court on the failure of the state to appear, after the due service of process, has been also prescribed.

In this case, the subpoena has been served, as is required by the rule. The complainant, according to the practice of the court, and according to the general order made in the case of *Grayson v. Commonwealth of Virginia*, has a right to proceed *ex parte*; and the court will make an order to that effect, that

the cause may be prepared for a final hearing. If, upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

KANSAS v. COLORADO.

Reported in 206 U. S. 46.
(1907.)

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court: While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the states are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between states. It is no longer open to question that by the constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of states. Whatever powers of government were granted to the nation or reserved to the states (and for the description and limitation of those powers we must always accept the constitution as alone and absolutely

controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the constitution, sitting as a committee of the whole, was: "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." 1 Eliot's Debates, 151.

In *M'Culloch v. State of Maryland*, 4 Wheat. 316, 404, Chief Justice Marshall said:

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

See also *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, opinion by Mr. Justice Story.

In *Dred Scott v. Sandford*, 19 How. 393, 441, Chief Justice Taney observed:

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

And in *Miller on the Constitution of the United States*, p. 83, referring to the adoption of the constitution, that learned jurist said: "It was then that a nation was born."

In the constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a congress," etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no

general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

In *M'Culloch v. State of Maryland*, *supra*, 405, Chief Justice Marshall said:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that Section 1 reads that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts, as the congress may from time to time ordain and establish." By this is granted the entire judicial power of the nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. Construing this article in the early case of *Chisholm v. Georgia*, 2 Dall, 419, the court held that the judicial power of the supreme court extended to a suit brought against a state by a citizen of another state. In announcing his opinion in the case, Mr Justice Wilson said (p. 453):

"This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one, no less radical than this: Do the people of the United States form a nation?"

In reference to this question attention may, however, properly be called to *Hans v. Louisiana*, 134 U. S. 1.

The decision in *Chisholm v. Georgia* led to the adoption of the eleventh amendment to the constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or citizens or subjects of a foreign state. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one state against another. As said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 407. "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." See also *South Dakota v. North Carolina*, 192 U. S. 286.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature can not rule the creator. *Kawananakoa v. Polyblank, Trustee, etc.*, 205 U. S. 349. Nor is it inconsistent with the ruling in *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265, that an original action can not be maintained in this court by one state to enforce its penal laws against a citizen of another state. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the state.

These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the constitution, either in terms or by necessary implication, whereas

in respect to judicial functions the question is whether there be any limitations expressed in the constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in *Missouri v. Illinois & Chicago District*, 180 U. S. 208, 220. The ninth article of the articles of confederation provided that "the United States in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states, concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the constitution provision was made giving to the supreme court "jurisdiction of controversies between two or more states, except such as shall regard territory or jurisdiction," and also that the senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the states respecting jurisdiction or territory. As finally adopted, the constitution omits all provisions for the senate taking cognizance of disputes between the states and leaves out the exception referred to in the jurisdiction granted to the supreme court. That carries with it a very direct recognition of the fact that to the supreme court is granted jurisdiction of all controversies between the states which are justiciable in their nature. "All the states have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788; that we should do that which neither states nor congress could do, settle the controversies between them." *Rhode Island v. Massachusetts*, 12 Pet. 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States v. Texas*, 143 U. S. 621; s. c., 162 U. S. 1; *United States v. Michigan*, 190 U. S. 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas v. United States*, 204 U. S. 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human

interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent the continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the dependent corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails, it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas river into Arkansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow, has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right, is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the states or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, 180 U. S. 208, the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states. Arid lands abound in Colorado.

Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

For the interesting litigation between the States of Virginia and West Virginia and its historical foundation, see 11 Wall. 39, 102 U. S. 674, 206 U. S. 290, 209 U. S. 514, 220 U. S. 1, 222 U. S. 17, 231 U. S. 89, 234 U. S. 117, 238 U. S. 202.

d. Suit between a state and a citizen or subject.

In the constitution, Article III, Section 2, clause 2, the supreme court is given original jurisdiction in cases in which a state shall be a party; in 1 Stat. L., page 80, Act of September 24, 1789, Section 13, and Judicial Code, 1911, Section 233, it is provided that such jurisdiction shall be original but not exclusive.

In *Ames v. Kansas*, 111 U. S. 449, at p. 463, the court (C. J. Waite) says: "Within six months after the inauguration of the government under the constitution, the Judiciary Act of 1789, c. 20, 1 Stat. 73, was passed. The bill was drawn by Mr. Ellsworth, a prominent member of the convention that framed the constitution, who took an active part in securing its adoption by the people, and who was afterwards chief justice of this court. Section 13 was as follows: 'That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambas-

sadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party.' The same act also, by Section 9, gave the district court jurisdiction exclusively of the courts of the several states of suits against consuls or vice-consuls, except for certain offenses, and by Section 25 conferred upon the supreme court appellate jurisdiction for the review, under some circumstances, of the final judgments and decrees of the highest courts of the states in certain classes of suits arising under the constitution and laws of the United States.

"It thus appears that the first congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the constitution by the states and with the objections urged against it, did not understand that the original jurisdiction vested in the supreme court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a state was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

"Acting on this construction of the constitution, congress took care to provide that no suit should be brought against an ambassador or other public minister except in the supreme court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the supreme court was made concurrent with the district courts, and suits of a civil nature could be brought against them in either tribunal. With respect to states, it was provided that the jurisdiction of the supreme court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except, also, between a state and citizens of other states or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the supreme court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the supreme court exclusive original jurisdiction in suits against a state begun without its consent, and to allow the state to sue for itself in any tribunal that could entertain its case. In this way states, ambassadors, and

public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose. * * *

"In view of the practical construction put on this provision of the constitution by congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist."

The court in this case held that a case in which the state sued a corporation created under the laws of the plaintiff state, said case arising under the laws of the United States, may be removed to the circuit court of the United States under the Act of March 3, 1875, 18 Stat. L. 470; and see *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, above.

Pennsylvania v. Wheeling & Belmont Bridge Company, 13 How. 518, in which is upheld the jurisdiction of the supreme court to entertain the suit of the state of Pennsylvania against a Virginia company to abate the nuisance created by a low bridge over the Ohio river, causing injury to the direct interest of the state of Pennsylvania in the navigation.

In *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, it was decided that a state can not maintain an original action in the United States supreme court to enforce its criminal laws against a citizen of another state.

In *California v. Southern Pacific Co.*, 157 U. S. 229, it is held that the United States supreme court has no original jurisdiction of suit between a state and citizens thereof and citizens of another state joined as defendants.

e. Suits involving representatives of foreign governments.

DAVIS v. PACKARD.

Reported in 7 Peters, 276.
(1833.)

ERROR to the court for the correction of errors of the state of New York. The defendants in error, Isaac Packard and

others, instituted a suit in the supreme court of judicature of the state of New York, against Isaac Hill and Ralph Haskins; and at August term 1824, of that court, Charles A. Davis, the plaintiff in error, entered into a recognizance as special bail of Isaac Hill. Judgment having been obtained against the defendant, Isaac Hill, in that suit, the plaintiffs in the same, Isaac Packard and others, brought an action of debt on the recognizance, in the same court, against Charles A. Davis, as bail, to January term 1830. To this action, Mr. Davis appeared by attorney, and upon several issues of fact and in law, judgment was rendered against him, at May term of the court, for \$4,538.20 debt, and \$469.09 damages and costs. Upon this judgment, Mr. Davis prosecuted a writ of error to the court for the correction of errors for the state of New York.

In the court for the correction of errors, the plaintiff assigned as error, "that he, the said Charles A. Davis, at the time of the commencement of the suit of the said Isaac Packard, Henry Disdier and William Murphy against him the said Charles A. Davis, was, and ever since hath continued to be, and yet is, consul general of his majesty the King of Saxony, in the United States, duly admitted and approved as such by the president of the United States. That being such, he ought not, according to the constitution and law of the United States, to have been impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States; and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognizance of the said cause; therefore in that, there is manifest error. And this he, the said Charles A. Davis, is ready to verify; wherefore, he prays that the judgment aforesaid, for the error aforesaid, may be revoked, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the judgment aforesaid."

To this assignment of errors, the defendants in the court for the correction of errors filed the following plea: * * *

THOMPSON, Justice, delivered the opinion of the court: The writ of error in this case brings up for review a judgment recovered against the plaintiff in error in the court for the

correction of errors, in the state of New York. The case was before this court at the last term (6 Pet. 41), on a motion to dismiss the writ of error for want of jurisdiction. This court sustained its jurisdiction under the twenty-fifth section of the Judiciary Act, on the ground, that the decision in the state court was against the exemption set up by the plaintiff in error, viz., that he being consul general of the King of Saxony, in the United States, the state court had not jurisdiction of the suit against him. The principal difficulty in this case seems to grow out of the manner in which the exemption set up by the plaintiff in error was brought under the consideration of the state court, and in a right understanding of the ground on which the court decided against it.

As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, and other public ministers and consuls, etc. And the Judiciary Act of 1789, Section 9 (1 U. S. Stat. 76), gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offenses mentioned in the act. The record sent up with the writ of error in this case, shows that the suit was commenced in the supreme court of the state of New York; and that the plaintiff in error did not plead or set up his exemption in that court, but on the cause being carried up to the court for correction of errors, this matter was assigned for error in fact; notwithstanding which the court gave judgment against the plaintiff in error.

It has been argued here, that the exemption might have been excluded by the court for the correction of errors, on the ground that it was waived by not having been pleaded in the supreme court. It is unnecessary to decide definitely whether, if such had been the ground on which the judgment of the state court rested, it would take the case out of the revising power of this court, under the twenty-fifth section of the Judiciary Act; for we can not say, judging from the record, that the judgment turned on this point; but, on the contrary, we think the record does not warrant any such conclusion.

It has been repeatedly ruled in this court, that we can look only to the record, to ascertain what was decided in the court below. The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. And it is the judgment of the court of errors, and not of the supreme court, with which we have to deal. Looking to the record, we find, that when the cause went up, upon a writ of error from the supreme court, to the court for the correction of errors, it was assigned as error in fact, that Charles A. Davis, before and at the time of commencing the suit against him, was, and ever since has continued to be, and yet is, consul general of his majesty the King of Saxony, in the United States, duly admitted and approved as such by the president of the United States. The record shows no objection to the time and place, when and where this matter was set up, to show that the supreme court of New York has not jurisdiction of the case. The only answer to this assignment of errors is, that there is no error in the record and proceedings aforesaid, nor in the giving the judgment aforesaid, because it nowhere appears by the record, proceedings or judgment, that the said Charles A. Davis ever was consul of the King of Saxony. This was no answer to the assignment of errors; it was not meeting or answering the matter assigned for error. It is not alleged in the assignment of errors, that it does appear, by the proceedings or judgment in the supreme court of New York, that Charles A. Davis was consul of the King of Saxony.

Matter assigned in the appellate court, as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law. Suppose infancy should be assigned as error in fact; would it be any answer to say, that it nowhere appeared by the record, that the defendant in the court below was an infant? The whole doctrine of allowing, in the appellate court, the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.

But the answer to the assignment of errors prays that the court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matters aforesaid above assigned for error. Under this informal state of the

pleadings in the court for the correction of errors, how is this court to view the record? The most reasonable conclusion is, that the court disregarded matters of form, and considered the answer of the defendants in error as a regular joinder in error. And this conclusion is strengthened, when we look at the form of the entry of judgment. "Whereupon, the said court for the correction of errors, after having heard the counsel for both parties, and diligently examined and fully understood the causes assigned for error," etc., affirms the judgment.

The only cause assigned for error was, that Charles A. Davis was consul general of the King of Saxony; and the conclusion must necessarily follow, that this was not, in the opinion of the court, a sufficient cause for reversing the judgment. If it had been intended to say, it was not error, because not pleaded in the court below, it would probably have been so said. Although this might not perhaps have been strictly technical, yet as the court gave judgment on the merits, and did not dismiss the writ of error, it is reasonable to conclude, that the special grounds for deciding against the exemption set up by the plaintiff in error, would have been in some way set out in the affirmance of the judgment.

If any doubt or difficulty existed with respect to the matters of fact set up in the assignment of errors, the court for the correction of errors was, by the laws of New York, clothed with ample powers to ascertain the facts. The statute (2 Laws N. Y. 601) declares, "that whenever an issue of fact shall be joined upon any writ of error returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ or the proceedings thereon, the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties, to try such question of fact, at the proper circuit court or sittings; and to certify the verdict thereupon to the court for the correction of errors." No such issue having been directed, we must necessarily conclude, that no question of fact was in dispute; and as the record contains no intimation that this matter was not set up in proper time, the conclusion would seem irresistible, that the court for the correction of errors considered the matter itself, set up in the assignment, as insufficient

to reverse the judgment. This being the only question decided in that court, is the only question to be reviewed here; and viewing the record in this light, we can not but consider the judgment of the state court in direct opposition to the act of congress, which excludes the jurisdiction of the state courts, in suits against consuls.

But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the supreme court, we should incline to say, it was not. If this was to be reviewed merely as a personal privilege, there might be grounds for such a conclusion; but it can not be so considered. It is the privilege of the country or government which the consul represents; this is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect. If the privilege or exemption was merely personal, it can hardly be supposed, that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision; it was deemed fit and proper, that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments. That it is not considered a personal privilege in England, is evident from what fell from Lord Ellenborough in the case of *Marshall v. Critico*, 9 East 447. It was a motion to discharge the defendant from arrest, on common bail, on the ground of his privilege under the Statute 7 Ann. c. 12, as being consul general from the Porte. Lord Ellenborough said, this is not a privilege of the person, but of the state he represents; and the defendant having been divested of the character in which he claims that privilege, there is no reason why he should not be subject to process as other persons, and the motion was denied on this ground.

Nor is the omission to plead the privilege deemed a waiver, in England, as is clearly to be inferred from cases where application has been made to discharge the party from execution, on the ground of privilege, under the Statute of Ann., which is considered merely as declaratory of the law of nations; and no

objection appears to have been made, that the privilege was not pleaded. 3 Burr. 1478, 1676.

It may not be amiss barely to notice another argument which has been pressed upon the court, by the counsel for the defendants in error, although we think it does not properly arise upon this record. It is said, the act of congress does not apply to this case, because, being an action upon a recognizance of bail, it is not an original proceeding, but the continuation of a suit rightfully commenced in a state court. The act of congress is general, extending to all suits against consuls; and it is a little difficult to maintain the proposition, that an action of debt upon recognizance of bail is not a suit. But we apprehend the proposition is not well founded; that it is not, in legal understanding, an original proceeding. It is laid down in the books, that a *scire facias* upon a recognizance of bail is an original proceeding; and if so, an action of debt upon the recognizance is clearly so. A *scire facias* upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit. It is argued, that debt on recognizance of bail, is a continuation of the original suit, because, as a general rule, the action must be brought in the same court. Although this is the general rule because that court is supposed to be more competent to relieve the bail, when entitled to relief, yet, whenever, from any cause, the action can not be brought in the same court, the plaintiff is never deprived of his remedy, but allowed to bring his action in a different court; as, where the bail moves out of the jurisdiction of the court. This is the settled rule in the state of New York; and it is surely a good reason for bringing the suit in another court, when the law expressly forbids it to be brought in the same court where the original action was brought. 2 Wms. Saund. 71a; Tidd's Pract. 1099 (6th ed.); 2 Arch. Pract. 86, b. 3, ch. 3; 7 Johns, 318; 9 *Ibid.* 80; 12 *Ibid.* 459; 13 *Ibid.* 424; 1 Chit. 713; 18 Eng. Com. Law 212, note a.

But the reversal of the judgment in this case is put on the ground, that from the record we are left to conclude, that the court for the correction of errors decided, that the character of consul general of the King of Saxony, did not exempt the

plaintiff in error from being sued in the state court. Judgment reversed.

This case came on to be heard, on the transcript of the record from the court for the trial of impeachments and correction of errors for the state of New York, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the plaintiff in error being consul general of the King of Saxony, exempted him from being sued.

GITTINGS v. CRAWFORD.

Reported in Federal Cases 5465 (Taney, 1).
(1838.)

IN the circuit court of the United States for the district of Maryland.

TANEY, Circuit Justice: The suit in this case was brought by John S. Gittings against John Crawford, upon a promissory note made by Crawford to Gittings, for \$980, dated December 27, 1834, and payable twenty days after date. The writ stated the plaintiff to be a citizen of the state of Maryland, and the defendant to be the consul of his Britanic majesty. The defendant appeared to the suit, and moved to quash the writ, on the ground that the district court had no jurisdiction over the case; the court below sustained the motion, quashed the writ, and gave judgment in favor of the defendant for costs. (Case unreported.) The case has been brought here by the plaintiff, by writ of error, and the question to be now decided by this court is, whether the Act of Congress of September 24, 1789, Section 9, giving jurisdiction to the district court of the United States, in cases of this description, against consuls and vice-consuls, is constitutional or not.

The clause of the constitution of the United States which is supposed to be violated by this law, is that part of the second section of the third article, which declares that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." It is insisted, that the grant of original jurisdiction in these cases to the supreme court, means exclusive original jurisdiction, and that it is not in the power

of congress to confer original jurisdiction, in the cases there mentioned, upon any other court.

The question thus presented for the decision of the circuit court, is certainly a difficult and embarrassed one. Different opinions have been expressed upon it by eminent men in high judicial stations; and the difficulties which arise from the words of the constitution itself have been greatly multiplied by the different constructions, which, at different times, have been given to the clause in question.

The earliest case upon the subject is *United States v. Ravara* (Case No. 16122), in the year 1793. That was an indictment in the circuit court against a consul, for a misdemeanor; and the counsel for the defendant moved to quash the indictment, upon the ground that the clause of the constitution above quoted vested exclusive jurisdiction in such cases in the supreme court, and that the Act of 1789, which conferred original jurisdiction on the circuit court, was unconstitutional and void. A majority of the court, however, overruled the objection, and decided that the grant of original jurisdiction to the supreme court was not exclusive; that congress might vest original jurisdiction, in the cases there enumerated, in other courts, and that the Act of 1789, conferring jurisdiction upon the circuit court, was constitutional and valid. At a subsequent term of the circuit court, in 1794, the case came up for trial, Chief Justice Jay presiding, and the court charged that the defendant was not privileged from prosecution in virtue of his consular appointment, and the jury, under that charge, found him guilty.

It appears, then, that in the circuit court, upon two different occasions, it was held, that the jurisdiction conferred by the constitution upon the supreme court, in cases affecting consuls, was not exclusive. And these decisions were made by eminent and distinguished judges, some of whom had taken prominent and leading parts in the discussions which preceded its adoption by the people. These discussions have all the force and authority which courts have uniformly given to the contemporaneous construction of a law.

But the authority of the decisions in the circuit court was shaken by the case of *Marbury v. Madison*, 1 Cranch (5 U. S.) 137, where the question as to the construction of this clause of

the constitution came, for the first time, before the supreme court. In the opinion delivered in that case, it was said, in general terms, by the court, that the original jurisdiction conferred on the supreme court was exclusive.

In *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 378, the construction of this part of the constitution again came under consideration. And although the court reviewed and recalled some of the *dicta* in the case of *Marbury v. Madison* (*supra*), yet what had been there said on the point now in question, was not disturbed, and the court again strongly intimated that the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States.

And in *Osborn v. United States Bank*, 9 Wheat. (22 U. S.) 820, the chief justice distinctly expressed the opinion that the original jurisdiction granted to the supreme court, is exclusive, and can not be given by congress to any other tribunal.

It is worthy of remark, that in two of these three cases in the supreme court, the question was upon the jurisdiction of that court, and not upon the jurisdiction of an inferior tribunal of the United States. And in the last of them, the question was upon the jurisdiction of the courts of the United States, as contradistinguished from the state courts; and the further question under the case before them arose under a law of the United States. In neither of these three, was the point directly presented, whether congress could grant original jurisdiction to an inferior court, in the cases enumerated in the clause now in controversy. All therefore that was said by the court in these cases, on that question, was by way of argument and illustration, and not necessarily involved in the decision of the cases then before the court. And we are warned by the chief justice in the opinion delivered by him in *Cohens v. Virginia* (*supra*), that principles thus stated are not to be regarded as binding adjudications; and some of the principles strongly put forth by him in the case of *Marbury v. Madison*, are repudiated and overruled in *Cohens v. Virginia*.

Yet, after these repeated declarations of the opinion of the supreme court, so explicitly reiterated in the case of *Osborn v.*

United States Bank (supra), I should not have felt myself at liberty to adopt a different construction of the article in question, if the action of the supreme court on this subject had stopped with the last-mentioned case; for the controversy involves no right reserved to the states or secured to individual citizens. It is a question merely of the distribution of power among the courts of the United States, and when the supreme court had so repeatedly expressed its opinion, that that court, under the constitution, had exclusive original jurisdiction over the subject-matters enumerated in the clause now under consideration, it would hardly have been proper or decorous in the circuit court to disregard those opinions, although they were expressed when the point in controversy was not directly before it.

But the action of the supreme court did not stop with the cases above cited; the point in dispute was brought direct before the court in *United States v. Ortega*, 11 Wheat. (24 U. S.) 467. That case came before the supreme court upon a certificate of division of the judges of the circuit court, and the points presented by the certificate were: 1. Whether it was a case affecting an ambassador or public minister; and 2. If it were such a case, was the Act of 1789, giving original jurisdiction to the circuit court, constitutional or not? The court said it was not necessary to decide the second point, because they were of opinion that it was not a case affecting an ambassador or public minister. It can hardly be supposed, that the supreme court would have refused to express an opinion on the second point, if they had regarded the question as settled by the previous decisions of that court. The manner in which they treated it, when thus directly brought into discussion, shows that in their opinion, it was still an open one, and had not been concluded by anything said in the different opinions of the court to which I have before referred; and the reporter in a note to this case expressly states that the point in question had not been decided by the supreme court.

But in another and very late case the court have, in my judgment, distinctly affirmed the constitutionality of the Act of 1789, on the very point in controversy. In the case of *Davis v. Packard*, 7 Pet. (32 U. S.) 281, the question was brought before the court by writ of error from the court of errors of New York,

which court was supposed to have decided that a state court had jurisdiction in cases where a consul was concerned. It turned out afterwards, that the court had not so decided; but the supreme court, when the case came before them, interpreted the record otherwise, and, acting upon that interpretation, reviewed the judgment of the court of errors of New York. Judge Thompson, in delivering the judgment of the supreme court, says: "As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the Judiciary Act of 1789, Section 9 (1 Stat. 76), gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offenses mentioned in the act." This language used by the court, with the point directly before them, can only be understood as an affirmance of the constitutionality of the Act of 1789; for the exclusion of the state courts is not put upon the ground, that they were impliedly excluded by the grant of original jurisdiction in such cases to the supreme court; but the decision is placed on the grant of power to the courts of the United States generally, and on the Act of 1789, which conferred the jurisdiction on the district courts, and excluded the state courts. No notice is taken, in that opinion, of the clause conferring original jurisdiction on the supreme court. The exclusion of the state courts is not derived from it, but from the Act of 1789; so, of course, that act was deemed constitutional.

This decision is in conformity with the contemporaneous construction of the constitution, given by the circuit court in the case of *United States v. Ravara*, before referred to. And although the authority of that case was much doubted, after the opinions delivered in *Marbury v. Madison*, *Cohens v. Virginia*, and *Osborn v. United States Bank* (*supra*), and more especially on account of the high and just reputation of the eminent judge by whom those opinions were delivered, yet this vexed question ought, in my judgment, to be regarded as now settled by the case of *Davis v. Packard* (*supra*).

It is worthy of remark, also, that the elementary writers, generally, seem to have regarded the Act of 1789 as constitutional, and to have relied on the case of *United States v. Ravara*; *Vide (United States v. Ortega)* 11 Wheat. (24 U. S.) 473, note; Rawle, Const. 221, 222; Conk. Exec. Powers, 160; Serg. Const. Law, cc. 17, 18.

Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used. The fact that the law in question was passed by such a body, is strong evidence that the words of the constitution were not intended to forbid its passage.

Nor am I by any means satisfied that the words used require a different construction from that given to them by the Act of 1789. There are no express words of exclusion in the clause which confers original jurisdiction, in the cases mentioned, upon the supreme court. Why should they be implied? They are clearly not implied in relation to the state courts, in the clause immediately preceding, which gives judicial power in certain cases to the courts of the United States; for there are some subjects there enumerated from which it never could have been designed to exclude altogether the state authorities; for example, the constitution of the United States is the supreme law in the several states, and the courts of the states are bound to respect and interpret it, and to declare any state law null and void which violates its provisions. Again, the laws of congress, when passed in the exercise of its constitutional powers are obligatory upon the state courts, and must be construed by the courts, and obeyed by them, whenever they come in conflict with the laws of the state. It is true, that the decisions of the state courts must be subordinate to, and subject to the revision of, the supreme court of the United States, to whom the ultimate decision of such questions belong; yet, the state courts are not, and can not, from the nature of our institutions, be

excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them. If the grant of jurisdiction to the courts of the United States, generally, is not, by implication, the exclusion of all other courts, in the cases enumerated in that grant of power, why should the grant of original jurisdiction to the supreme court in certain cases, in the very same section, and by the next succeeding clause, be held to imply such exclusion? The original jurisdiction conferred on the supreme court is not inconsistent with the exercise of original jurisdiction on the same subjects by the inferior courts of the United States, and there is no necessity, therefore, for implying an intention to exclude them.

Indeed, if the grant of original jurisdiction, in the cases mentioned, implied exclusion of jurisdiction on those subjects, the exclusion would seem most naturally to apply to the appellate jurisdiction of the court itself, and to prohibit it from the exercise of the latter in the cases where the former was given. The subject-matter of this part of the section is the jurisdiction of the supreme court, and it is divided into appellate and original. The cases are enumerated in which it shall have original jurisdiction; and appellate is given to it in others. Now it might very well be supposed, that in thus classing the subjects upon which it should have original, and upon which it should have appellate jurisdiction, the framers of the constitution meant to limit its jurisdiction in the manner in which it is there divided, and to exclude it from original jurisdiction where appellate was given, and to exclude it from appellate where original was given, and this was supposed to be the construction given to it in the case of *Marbury v. Madison* (*supra*), by the learned judge who delivered the opinion. But when the subject was further discussed and considered in the case of *Cohens v. Virginia* (*supra*), it became manifest, that such a construction could not be sustained, without depriving the supreme court of some of its most important and necessary powers; powers which, from the whole frame of the instruction, it was evidently intended that the court should exercise; and which, although classed in its original jurisdiction, it could exercise only in an appellate form, when the question arose in a suit in a state court. The language

used in *Marbury v. Madison* was therefore qualified and explained, and it was decided, that the grant of original jurisdiction, in the cases enumerated, to the supreme court, did not exclude from appellate jurisdiction over the same subjects. And this latter construction is now the established law of the country. If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter.

Nor is there anything in the official character and functions of a consul which should lead us to suppose, that the framers of the constitution meant to confine cases affecting such officer exclusively to the supreme court. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offense he may commit against its laws. Wheat. Int. Law, 181; 1 Kent. Comm. 43, 45. He, usually, is a person engaged in commerce; and in this country, as well as others, it often happens, that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been

intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offense that might be committed by a consul, in any part of the United States; that consul too, being often one of our own citizens. There is no reason, either of policy or convenience, for introducing such a provision in the constitution; and we can not, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the Act of 1789 is unconstitutional and void.

The judgment of the district court in this case must, therefore, be reversed, and the motion to quash the writ which issued from that court overruled.

In re Baiz, 135 U. S. 403. Court may accept certificate of department of state as to public character of one claiming to be a foreign minister, and therefore privileged in judicial proceedings.

See *Pooley v. Luco* (Consul General of Chile at San Francisco), 76 Fed. 146; and *Börs v. Preston* (Consul of Norway and Sweden at port of New York), 111 U. S. 252; and *Ames v. Kansas*, 111 U. S. 449, 469, (citing *Börs v. Preston* with approval on point of power of congress to confer jurisdiction on inferior court of case over which constitution confers original jurisdiction on supreme court).

3. SPECIAL COURTS.

a. Court of claims.

Originally created by statute of February 24, 1855, 10 Stat. L. 612, Chapter 22, now contained in Federal Judicial Code of March 3, 1911, Sections 136 to 187.

In *Nichols v. United States*, 7 Wall. 122, it was held that the court of claims was not given jurisdiction over claims asserted against the government growing out of the administration of the revenue laws; such claims are to be prosecuted as provided by the revenue laws, which afford certain remedies, and to entertain such claims under the general jurisdiction of the court of claims would tend to embarrass the government in the collection of revenue.

UNITED STATES v. JONES.

Reported in 131 U. S. 1.

(1889.)

MR. JUSTICE BRADLEY, after stating the case as above reported, delivered the opinion of the court: The question involved is, whether the Act of March 3, 1887, which is entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505), authorizes suits of the kind like the present, which are brought not for the recovery of money, but for equitable relief by specific performance, to compel the issue and delivery of a patent. In the case of *United States v. Alire*, 6 Wall. 573, we distinctly held that the Acts of 1855 and 1863, which established the court of claims and defined its jurisdiction, did not give it power to entertain any such suits as these; and that case was followed by *Bonner v. United States*, 9 Wall. 156, and has been approved in subsequent cases. *United States v. Gillis*, 95 U. S. 407, 412; *United States v. Schurz*, 102 U. S. 378, 404. It is argued, however, that the new law has extended the jurisdiction of the court of claims and the concurrent jurisdiction of the circuit and district courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property, as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature. A careful examination of the statute, and a comparison of its terms with those of the Acts of 1855 and 1863, can alone settle the question.

By the first section of the Act of February 24, 1855, 10 Stat. 612, c. 122, it was enacted that a court should be established, to be called the court of claims, the jurisdiction of which was defined as follows: "The said court shall hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon

any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of congress." The Act of March 3, 1863, passed to amend the Act of 1855, 12 Stat. 765, c. 92, added: "That the said court * * * shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court." Jurisdiction was subsequently given of claims for the proceeds of property captured or abandoned during the rebellion, and of claims of paymasters and other disbursing officers for relief from responsibility on account of capture of government funds or property in their hands. These latter branches of jurisdiction need not be considered here.

Turning now to the Act of March 3, 1887, which re-enacted or revised the previous laws as to the jurisdiction of the court of claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts, we find the following language used:

"The court of claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. * * * "

"Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

"Section 2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the

amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.”

The jurisdiction here given to the court of claims is precisely the same as that given in the Acts of 1855 and 1863, with the addition that it is extended to “damages * * * in cases not sounding in tort” and to claims for which redress may be had “either in a court of law, equity, or admiralty.”

“Damages in cases not sounding in tort”—that is to say, damages for breach of contract—had already been held to be recoverable against the government under the former acts. *United States v. Behan*, 110 U. S. 338; *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645; *Hollister v. Benedict & Burnham Manfg. Co.*, 113 U. S. 59, 67.

“Claims” redressible “in a court of law, equity, or admiralty,” may be claims for money only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the Act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus, in the fifth section of the Act of 1863, the right of appeal was limited to cases in which the amount in controversy exceeded three thousand dollars, and in the seventh section it was provided that if judgment should be given in favor of the claimant, the sum due thereby should be paid out of any general appropriation made by law for the payment of private claims; and if a judgment was affirmed on appeal, interest was to be allowed thereon, etc. In the case of *United States v. Alire*, 6 Wall. 573, Mr. Justice Nelson speaking for the court, said: “It will be seen by reference to the two acts of congress on this subject that the only judgments which the court of claim is authorized to render against the government, or over which the supreme court has any jurisdiction, on appeal, or for the payment of which by the secretary of

treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the Act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." The decree of the court of claims in that case was that the claimant recover of the government a military land warrant for one hundred and sixty acres of land, and that it be made out and delivered to him by the proper officer. This court said: "We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the court of claims, to be obeyed or satisfied."

The sections of the Act of 1863 referred to in this opinion are still in force, not being repealed by the Act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section five, relating to appeals, is transferred to Section 707 of the Revised Statutes, giving an appeal to this court "where the amount in controversy exceeds three thousand dollars;" and Section 7, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in Sections 1089, 1090 of the Revised Statutes. These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the Act of 1887 declares that "the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act," and the ninth section declares, "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein

contained." These provisions undoubtedly include the court of claims as well as the district and circuit courts. So, in relation to interest, Section 10 declares that "from the date of such final judgment or decree interest shall be computed thereon, at the rate of four per cent. per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of congress to go farther than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the act is against any farther extension than that here indicated. The expression in the fifth section, referring to "money or any other thing claimed, or the damages sought to be recovered," on which so much reliance is placed by the appellees, can not outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context.

We can not yield to the suggestion that any broader jurisdiction as to subject-matter is given to the circuit and district courts than that which is given to the court of claims. It is clearly the same jurisdiction—"concurrent jurisdiction" only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached. It is declared "that the district courts of the United States shall have concurrent jurisdiction with the court of claims * * * where the amount of the claim does not exceed one thousand dollars," etc. This language is properly applicable only to a money claim. Had anything but money been in the legislative mind the language would have been, "where the amount or value of the thing claimed does not exceed one thousand dollars," etc.

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

The decrees of the court are reversed in all the cases, and the causes are respectively remanded with instructions to dismiss the original petitions or bills.

In *Schillinger v. United States*, 155 U. S. 163, the court held that a suit for wrongful appropriation of property is one sounding in tort, and not therefore maintainable in the court of claims.

DOOLEY v. UNITED STATES.

Reported in 182 U. S. 222.

(1901.)

THIS was an action begun in the circuit court, as a court of claims, by the firm of Dooley, Smith & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of \$5,374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900, viz.:

1. From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rican duties.

2. From August 19, 1898, until February 1, 1899, under the customs tariff for Porto Rico, proclaimed by order of the president.

3. From February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the president.

It thus appears that the duties were collected partly before and partly after the ratification of the treaty, but in every instance prior to the taking effect of the Foraker act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

A demurrer was interposed upon the ground of the want of jurisdiction, and the insufficiency of the complaint. The circuit court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error.

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the court:

1. The jurisdiction of the court in this case is attacked by the government upon the ground that the circuit court, as a court of claims, can not take cognizance of actions for the recovery of duties legally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker Act, 24 Stat. 505, c. 359, the court of claims was vested with jurisdiction over "first, all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable;" and by Section 2 the district and circuit courts were given concurrent jurisdiction to a certain amount.

The first section evidently contemplates four distinct classes of cases: (1) those founded upon the constitution or any law of congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases

not sounding in tort. The words “not sounding in tort” are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

The question is, whether any claim sounding in tort can be prosecuted in the court of claims, notwithstanding the words “not sounding in tort,” in the Tucker Act, are apparently limited to claims for damages, liquidated or unliquidated.
* * * (Here the court discusses many cases and proceeds:)

In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the court of claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker Act of claims founded upon a law of congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker Act, has been repeatedly sustained.

As to the right to sue United States and what constitutes a suit against the United States, see *United States v. Lee*, 106 U. S. 196, where it was held that the doctrine that the United States can not be sued except where congress has so provided, has no application to officers and agents of the United States who as such are holding for public uses property the title to which is claimed by another.

And in *Louisiana v. McAdoo* (secretary of the treasury), 234 U. S. 627, it was held that a suit against the secretary of the treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, and to mandamus him to collect a specific amount, is in effect a suit against the United States, and permission to file the suit in the supreme court was therefore denied.

b. Court of customs appeals.

Judicial Code, 1911, Sections 188 to 199, 36 Stat. L., p. 105, Ch. 6.

C. APPELLATE JURISDICTION.

1. IN GENERAL.

In *Murdock v. City of Memphis*, 20 Wall. 590, at p. 621, the court (Justice Miller) says: "There are two principal methods known to English jurisprudence, and to the jurisprudence of the federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of *certiorari* at common law, and a certificate of division of opinion under the acts of congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior federal court to this court, does bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here the cases are not open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power."

WISCART v. D'AUCHY.

Reported in 3 Dallas, 321.

(1796.)

ERROR to the circuit court for the Virginia district. The original proceeding was on the equity side of the court below, where the defendant in error had filed a bill, charging Adrian Wiscart and Augustine De Neufville, copartners, with having fraudulently conveyed all their estate, real and personal, by three separate deeds, to Peter Robert De Neufville (who was also made a defendant to the bill), with a view to prevent the complainant's recovering the amount of a decree, which he had formerly obtained in another suit against them. The answer averred the conveyances to be made *bona fide*, and for a valuable consideration; but after a full hearing of the case, the circuit court (consisting of Judges Iredell and Griffin) delivered the following opinion:

"That the deeds filed as exhibits in this cause, one dated on the 20th of May, 1793, conveying the goods and chattels

in the schedule thereunto annexed, to the defendant, P. R. De Neufville; another dated on the seventeenth of the same month, conveying the slaves therein mentioned, to the said P. R. De Neufville; and another dated on the 20th day of the same month, conveying to him the land therein mentioned, are fraudulent, and were intended to defraud the complainant, and to prevent his obtaining satisfaction for a just demand; that the said P. R. De Neufville was a party and privy to the fraud aforesaid; and that the said deeds were void as to the complainant; whereupon, it is decreed and ordered, that the said deeds be by him, the said P. R. De Neufville, delivered to the clerks of this court, to be cancelled; that when thereunto required, he deliver up to the marshal of this court, so much of the personal property in the said deeds mentioned, or either of them, as is now in his hands or possession, to the end that the complainant may have an execution thereon; that he do account before one of the commissioners of this court for the value of all the personal property mentioned in the said deeds, or either of them, which he shall not be able to deliver up, from having disposed thereof, or from any other cause. And it is further ordered, that the defendants pay to the complainant his costs by him expended in the prosecution of this suit."

ELLSWORTH, Chief Justice: I will make a few remarks in support of the rule. The constitution, distributing the judicial power of the United States, vests in the supreme court, an original as well as an appellate jurisdiction. The original jurisdiction, however, is confined to cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, only an appellate jurisdiction is given to the court; and even the appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the congress shall make." Here, then, is the ground, and the only ground, on which we can sustain an appeal. If congress has provided no rule to regulate our proceedings, we can not exercise an appellate jurisdiction; and if the rule is provided, we can not depart from it. The question, therefore, on the constitutional

point of an appellate jurisdiction, is simply, whether congress has established any rule for regulating its exercise?

It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself, to control, modify or change the fixed and technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination, but the law. Does the statute observe this obvious distinction? I think it does. In the twenty-first section, there is a provision for allowing an appeal in admiralty and maritime causes from the district to the circuit court; but it is declared, that the matter in dispute must exceed the value of three hundred dollars, or no appeal can be sustained; and yet, in the preceding section, we find, that decrees and judgments in civil actions may be removed by writ of error from the district to the circuit court, though the value of the matter in dispute barely exceeds fifty dollars. It is unnecessary, however, to make any remark on this apparent diversity; the only question is, whether the civil actions here spoken of, include the causes of admiralty and maritime jurisdiction? Now, the term civil actions would, from its natural import, embrace every species of suit, which is not a criminal kind; and when it is considered, that the district court has a criminal as well as a civil jurisdiction, it is clear, that the term was used by the legislature, not to distinguish between admiralty causes and other civil actions, but to exclude the idea of removing judgments in criminal prosecutions, from an inferior to a superior tribunal. Besides, the language of the first member of the twenty-second section seems calculated to obviate every doubt. It is there said, that final decrees and judgments in civil actions in a district court may be removed into the circuit court, upon a writ of error; and since there can not be a decree in the district court, in any case, except cases of admiralty and maritime jurisdiction, it

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follows, of course, that such cases must be intended, and that if they are removed at all, it can only be done by writ of error.

In this way, therefore, the appellate jurisdiction of the circuit court is to be exercised; but it remains to inquire, whether any provision is made for the exercise of the appellate jurisdiction of the supreme court; and I think, there is, by unequivocal words of reference. Thus, the twenty-second section of the act declares, that "upon a like process," that is, upon a writ of error, final judgments and decrees in civil actions (a description still employed in contradistinction to criminal prosecutions) and suits in equity, in the circuit court, may be here re-examined, and reversed or affirmed. Among the causes liable to be thus brought hither upon a writ of error, are such as had been previously removed into the circuit court, "by appeal from a district court," which can only be causes of admiralty and maritime jurisdiction.

It is observed, that a writ of error is a process more limited in its effect than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformable to such regulations as are made by the congress, and if congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make nor adopt another. The law may, indeed, be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be. If, however, the construction, that a statement of facts by the circuit court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences. But, surely, it can not be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the circuit court has been made final, no denial of justice could be imputed to our government;

much less, can the imputation be fairly made, because the law directs that in cases of appeal, part shall be decided by one tribunal, and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England.

Nor is there anything in the nature of a fact, which renders it impracticable or improper to be ascertained by a judge; and if there were, a fact could never be ascertained in this court, in matters of appeal. If, then, we are competent to ascertain a fact, when assembled here, I can discern no reason why we should not be equally competent to the task, when sitting in the circuit court; nor why it should be supposed, that a judge is more able, or more worthy, to ascertain the facts in a suit in equity (which, indisputably, can only be removed by writ of error), than to ascertain the facts in a cause of admiralty and maritime jurisdiction.

The statute has made a special provision, that the mode of proof, by oral testimony and examination of witnesses, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law: but it was perceived, that although the personal attendance of witnesses could easily be procured in the district or circuit courts, the difficulty of bringing them from the remotest parts of the Union, to the seat of government, was insurmountable; and therefore, it became necessary, in every description of suits, to make a statement of the facts in the circuit court definitive, upon an appeal to this court.

If, upon the whole, the original constitutional grant of an appellate jurisdiction is to be enforced in the way that has been suggested, then all the testimony must be transmitted, reviewed, re-examined and settled here; great private and public inconveniences would ensue; and it was useless to provide that "the circuit court should cause the facts on which they found their sentence or decree fully to appear upon the record."

But, upon the construction contained in the rule laid down by the court, there can not, in any case, be just cause of complaint, as to the question of fact, since it is ascertained by an

impartial and enlightened tribunal; and, as to the question of law, the re-examination in this court is wisely meant, and calculated to preserve unity of principle, in the administration of justice throughout the United States.

On the 12th of August, the chief justice delivered the opinion of the court upon the point, whether there was, in this cause, such a statement of facts, as the legislature contemplated?

BY THE COURT: The decree states, that certain conveyances are fraudulent; and had it stopped with that general declaration, some doubt might reasonably be entertained, whether it was not more properly an inference, than the statement of fact; since fraud must always principally depend upon the *quo animo*. But the court immediately afterwards proceeded to describe the fraud, or *quo animo*, declaring, that "the conveyances were intended to defraud the complainant, and to prevent his obtaining satisfaction for a just demand;" which is not an inference from a fact, but a statement of the fact itself. It is another fact, illustrative of this position, that "the grantee was a party and privy to the fraud."

We are, therefore, of opinion, that the circuit court have sufficiently caused the facts on which they decided, to appear from the pleading and decree, in conformity to the act of congress. *The decree affirmed.*

2. APPELLATE JURISDICTION PRIOR TO 1891.

With certain restrictions as to amount involved, the Act of September 24, 1789, Sections 21 and 22 provided for error and appeal from the district court to the circuit court, thence to the supreme court, and Sections 23 and 24 contain provisions as to procedure in such cases.

Revised Statutes of the United States, 1878, Sections 631 and 633, continue the appellate jurisdiction, of the circuit court, with changes relating to jurisdictional amount, while Sections 691 and 692 continue the appellate jurisdiction of the supreme court with a larger jurisdictional amount required. These changes are found generally in the Acts of Congress of March 3, 1803, 2 Stat. L., 244, Chapter 40; of June 30, 1864, 13 Stat. L. 310, Chapter 174, Section 13, providing for appeal of prize causes directly from district court to supreme court; of June 1, 1872, 17 Stat. L., pp. 196, 197, Chapter 255, as to matters of form and time of appeal or error; of July 4, 1840, 5 Stat. L. 393, Chapter 43, Section 3, dealing with appellate jurisdiction of the supreme court from the circuit court; of February 16, 1875, 18 Stat. L., p. 315, Chapter 77, dealing with

the appellate jurisdiction of the supreme court and increasing the jurisdictional amount from \$2,000 to \$5,000.

The Act of September 24, 1789, provided for the review by the supreme court of cases appealed from the district court to the circuit court, but the Act of July 4, 1840, added cases taken on error from the district court to the circuit court.

Certain other statutes provided for appellate jurisdiction of the supreme court in specific cases without requirement as to jurisdictional amount; *e. g.*, Act of July 8, 1870, 16 Stat. L., p. 215, concerning patents and copyrights; of May 31, 1844, 5 Stat. L. 658, and of March 27, 1868, 15 Stat. L. 44, concerning revenue and revenue officers; of April 9, 1866, 14 Stat. L. 27, and of April 20, 1871, 17 Stat. L. 13, relating to civil rights.

But no radical change took place until the creation of the circuit court of appeals by Act of March 3, 1891, 26 Stat. L., 826, Chapter 517. A change had long been advocated, as early as 1880, and the house bill upon which the legislation as finally enacted was based, may be seen in Congressional Record, 51st Congress, 1st Session, p. 3402, and on p. 10218 the senate amendment substitute therefore, which in the main was enacted. The great purpose of the legislation was to provide relief for the supreme court, and the condition of the docket in that court summarily stated by Justice Harlan may be seen at page 3403, with a supplemental statement by Representative Rogers of Arkansas at the same page. Likewise at page 10220 may be seen statements and tables presented by Senator Evarts of New York showing the increase of the docket of the supreme court over a period of years just preceding the discussion and the docket at the opening of the then term of court.

Summarily stated, the supreme court was at that time one thousand six hundred and twenty-two cases in arrears, and was disposing of about four hundred cases annually, hence a new case could in the natural sequence be reached in about four years. As frequently asserted, such delay of justice constituted a denial of justice which was becoming increasingly flagrant because of the system. There was much agitation in congress for the abolition of the circuit court, but the experiment of creating a new court of solely appellate jurisdiction and at the same time abolishing a court that had been in existence from the beginning, presented too many possibilities for judicial confusion, the usual trepidation in the presence of judicial reform manifested itself, and congress rested after adding an appellate court to the system established one hundred years before.

The subtraction came in 1911, after twenty years more of experiment had demonstrated that the district and circuit courts were more or less duplicates and the circuit court was abolished. Finally we have the system so strenuously advocated by Representative Rogers of Arkansas from 1882 to 1891.

Note.—The history of this legislation may be traced as follows: Introduced as H. R. Bill 9014, 51st Congress, 1st Session, Cong. Rec., p. 3049, action thereon in House at pp. 3130, 3398; in Senate, pp. 3425, 8133, 8307,

10193, 10217, 10278, 10302, 10335, 10363, 10365; in House, pp. 10678, 10759. And in 51st Congress, 2d Session, Cong. Rec., pp. 2198, 3087, 3535, 3583, 3644, 3707, and approved at p. 3760.

See, also, H. R. Report No. 1295, and S. R. No. 1571.

3. CIRCUIT COURT OF APPEALS.

a. In general.

See the act of March 3, 1891, 26 Stat. L. 826, Chapter 517; and of March 3, 1911, 36 Stat. L. 1131, Chapter 231, Sections 116 to 135 (Judicial Code, 1911).

McLISH v. ROFF.

Reported in 141 U. S. 661.

(1891.)

MR. JUSTICE LAMAR delivered the opinion of the court: This was a suit brought in the United States court for the Indian territory, third judicial division, by A. B. Roff and W. R. Watkins against Richard McLish, for the recovery of about six hundred and forty acres of land situated in the Chickasaw nation, and belonging to said tribe. In their amended complaint, they alleged that the defendant, Richard McLish, is a member of the tribe of Chickasaw Indians by blood; that both plaintiffs, Roff and Watkins, were born in the United States, and are now, and always have been, citizens of the United States, neither of them ever having renounced their allegiance to the government of the United States, nor taken the oath of allegiance to the government known as the Chickasaw government. The complaint further alleged that both plaintiffs, Roff and Watkins, are members and citizens of the Chickasaw tribe of Indians by intermarriage, and not by nativity or adoption; that, on the fifteenth day of November, 1865, the plaintiff Watkins, by intermarriage with Elizabeth Tyson, a member of said tribe by blood, became himself a member of said tribe, and that the plaintiff Roff also became a member of the same tribe by intermarriage with Matilda Bourland, the daughter of an adopted member of the tribe, during the year 1867; that, as such citizens of the Chickasaw nation, the plaintiffs had the right to own and did own, on or about the first of September, 1888, as tenants in common, the tract of

land described in the complaint, and were in the actual possession thereof, but that on that day the defendant McLish entered upon the said premises and unlawfully ousted the plaintiffs therefrom; and that he unlawfully withholds the same, and has continuously done so up to the time of bringing this suit, to the damage of the plaintiffs, ten thousand dollars. They pray for the recovery of the said premises, with the rents, damages and costs; or, if the court holds that they are not entitled to the recovery of the land, that they recover the value of the improvements put thereon, which improvements are set forth in some detail in the complaint, amounting in value, in the aggregate, to \$2,875.00 by Roff, and to \$2,200.00 by Watkins.

At October term, 1890, the defendant filed his demurrer to the jurisdiction of the court on these grounds:

(1) It appears from plaintiffs' amended complaint that the parties plaintiff and defendant are citizens of the Chickasaw nation or tribe of Indians, and that the court is without jurisdiction over the parties to this suit, and of this the defendant prays the judgment of the court whether he ought to answer said complaint.

(2) It appears from the amended complaint that plaintiffs acquired their pretended rights as citizens of the Chickasaw nation, and that they claim such rights, because of their said citizenship; and that this is a controversy between citizens of the Chickasaw tribe of Indians, of which the courts of said tribe have exclusive jurisdiction, and of this the defendant prays a judgment of the court that this suit be dismissed. The demurrer was overruled by the court upon the ground that it had jurisdiction to hear and determine the cause, to which the defendant excepted. The defendant thereupon insisted that the jurisdiction of the court over the suit was at issue, and desiring to remove the cause by writ of error to the supreme court of the United States for its decision upon the question of jurisdiction involved, requested the court below to certify the question of jurisdiction involved to that court for review, offering to file a petition for a writ of error, with good and approved security, and asked that the court proceed no further with the cause until the jurisdiction should

be decided by the supreme court of the United States. The court denied said request and held that it was its duty to proceed with the trial of the case, notwithstanding the question of jurisdiction, and that the defendant could only appeal upon that question (of jurisdiction) to the supreme court of the United States from the final judgment of the court below; and required the defendant to proceed with the trial of the cause upon the merits; to all of which the defendant excepted, tendering his bill of exceptions, and asking that the same be allowed and certified, which was done by the judge of said court. He then sued out a writ of error from this court.

The writ of error is taken under the Act of March 3, 1891, 26 Stat. 826, c. 517, which, as we have decided in *In re Classen*, 140 U. S. 200, went immediately into effect on its enactment. The thirteenth section of that act placed the United States court in the Indian territory on the same footing with regard to writs of error and appeals to this court as that occupied by the circuit and district courts of the United States.

SECTION 5 of the same act provides:

“That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.”

Does this provision authorize an appeal or writ of error to be taken to this court for review of a question involving the jurisdiction of the court below, whenever it arises in the progress of a case pending therein; and does the taking of such appeal or writ of error operate to stay the further proceedings in the cause until the determination by this court of the jurisdictional question? Or, in other words, has this court jurisdiction to review the question before any final judgment in the cause?

The plaintiff in error contends that we have the jurisdiction to review such question, because (1) there is in the section above quoted no express requirement of finality of judgment; and (2) because there is a positive requirement that the ques-

tion of jurisdiction shall alone be certified to the supreme court from the court below for decision.

It is further argued that the omission of the word final in this particular provision, and the repeated use of that word in other sections of the act, in reference to a different class of cases, show the intent of the act to be that the review of the question of jurisdiction should not await the final determination of the case in the court below.

We think that upon sound principles of construction such is not the meaning of the act of congress under consideration. It is manifest that the words in Section 5, "appeals or writs of error," must be understood within the meaning of those terms as used in all prior acts of congress relating to the appellate powers of this court, and in the long standing rules of practice and procedure in the federal courts. Taken in that sense, those terms mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance. It is true that the Judiciary Act of 1789 limited the appellate jurisdiction of this court to final judgments and decrees, in the cases specified. This, however, in respect to writs of error was only declaratory of a well-settled and ancient rule of English practice. At common law no writ of error could be brought except on a final judgment. *Bac. Ab. Error*, A. 2. "If the writ of error be returnable before judgment is given, it may be quashed on motion." 2 *Tidd's Practice*, 1162. In respect to appeals there is a difference in the practice of the English chancery courts, in which appeals may be taken from an interlocutory order of the chancellor to the house of lords, and the practice of the United States chancery courts, where the right of appeal is by statute restricted to final decrees, so that a case can not be brought to this court in fragments.

From the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole

case and every matter in controversy in it decided in a single appeal. *Forgay v. Conrad*, 6 How. 201, 204. The construction contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed.

It is a matter of public history, and is manifest on the face of that act, that its primary object was to facilitate the prompt disposition of cases in the supreme court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations. That act, in substance, creates a new and distinct circuit court of appeals, in each circuit, to be composed of three judges, namely, the circuit justice when present, and two circuit judges, and also, in the absence of any one of these three, a district judge selected by assignment for the purpose of completing the court.

It then provides for the distribution of the entire appellate jurisdiction of our national judicial system, between the supreme court of the United States and the circuit court of appeals, therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction. But as to the mode and manner in which these revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts as to extend the jurisdiction of the supreme court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final, in the fifth section of the act should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, can not be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the

validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, as the case may be, to this court, independently of any final judgment upon them. The effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, with all the matters in controversy in it, by awaiting the final judgment, could be promptly decided in one appeal.

It is also insisted that Section 14 of the act in question, repealing Section 691 of the Revised Statutes and Section 3 of the Act of February 16, 1875, gives a wider scope to the revisory powers of this court, and makes a final judgment unnecessary to the exercise of these powers in the cases specified in said fifth section. We think that that repeal applies, in both sections mentioned, only to the provisions which limit the appellate power of the supreme court to cases involving the amounts there respectively specified, namely, \$2,000 in one and \$5,000 in the other. If it was the purpose of the act to repeal that part of those sections which refers to final judgments, such intention would have been indicated in express and explicit terms, inasmuch as there were, when the act was passed, other sections and other statutes containing the same limitation of appeals to final judgments.

It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this court, while the case on its merits would be certified to the circuit court of appeals; that the case would be before two separate appellate courts at one and the same time; and that the supreme court might dismiss the suit upon the question of jurisdiction while the circuit court of appeals might properly affirm the judgment of the lower court upon the merits. The fallacy which underlies this argument is the as-

sumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate courts. No such provision can be found in the act, either in express terms or by implication. The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in Section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court.

The writ of error is *dismissed*.

COLUMBUS CONSTRUCTION CO. v. CRANE COMPANY.

Reported in 174 U. S. 600.

(1899.)

IN May, 1891, the Columbus Construction Company, a corporation of the state of New Jersey, brought in the circuit court of the United States for the northern district of Illinois an action at law against the Crane Company, a corporation of the state of Illinois. The case was put at issue, and the trial resulted in a verdict and judgment in favor of the plaintiff in the sum of \$48,000. This judgment was reversed by the circuit court of appeals upon a writ of error sued out by the defendant. 46 U. S. App. 52. Thereafter the case was again tried and resulted in a verdict and judgment in favor of the defendant, upon a plea of set-off, in the sum of \$98,085.94, as of the date of March 2, 1898.

On the 25th day of August, 1898, a writ of error to reverse this judgment was sued out by the plaintiff from the circuit court of appeals of the seventh circuit, where the case is now pending.

On the 27th day of September, 1898, the plaintiff also sued out a writ of error from this court. On April 17, 1899, the defendant in error filed a motion to dismiss this writ of error; and on the same day the plaintiff in error filed a petition for a writ of *certiorari* to the circuit court of appeals of the seventh circuit.

MR. JUSTICE SHIRAS, after making the foregoing statement, delivered the opinion of the court: This record discloses that there are pending two writs of error to the judgment of the circuit court—one in the United States circuit court of appeals for the seventh circuit, sued out on the 25th day of August, 1898, and one in this court, sued out on the 27th day of September of the same year. It also appears that the jurisdiction of the circuit court is not in question, but the contention is that that court erred in the exercise of its jurisdiction.

We are of the opinion that the Act of March 3, 1891, c. 517, 26 Stat. 826, under which these writs of error were sued out, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and that, therefore, the writ in this court, which was taken while the case was pending in the circuit court of appeals, ought to be dismissed.

Such a question was considered by this court in *McLish v. Roff*, 141 U. S. 661, 667.

That was a case of a writ of error from this court to the United States court for the Indian territory, where a suit was pending and undecided, and the object of the writ was to get the opinion of this court on the question whether the lower court had jurisdiction of the suit. This court held that it was not competent for a party denying the jurisdiction of the trial court to bring that question here on a writ of error sued out before final judgment, and the writ was accordingly dismissed. * * *

We think the main purpose of the Act of 1891, which was to relieve this court of an enormous overburden of cases by creating a new and distinct court of appeals, would be defeated, if a party, after resorting to the circuit court of appeals and while his case was there pending, could be permitted, of his own motion, and without procuring a writ of *certiorari*, to bring the cause into this court.

Moreover, it is evident that such a movement is premature, for the controversy may be decided by the circuit court of appeals in favor of the plaintiff in error, and thus his resort to this court be shown to have been unnecessary.

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, is referred to as a case in which there was pending at the same time an appeal from a decree of the circuit court to the circuit court of appeals and to this court. An obvious distinction between that case and this is that there the appeal was first taken to this court. Accordingly the circuit court of appeals declined either to decide the case on its merits or to dismiss the appeal, while the case was pending on a prior appeal to this court, and continued the cause to await the result of the appeal to the supreme court. 39 U. S. App. 307.

Without, therefore, considering other grounds urged in the brief of the defendant in error on its motion to dismiss, we think a due regard for orderly procedure calls for a dismissal of the writ of error. *Dismissed.*

See notes to *Lau Ow Bew v. United States*, 1 C. C. A. 1, 5; and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

b. Cases made final.

LAU OW BEW v. UNITED STATES.

Reported in 144 U. S. 47.

(1892.)

THIS is a writ of *certiorari* for the review of a judgment of the circuit court of appeals for the ninth circuit, affirming the judgment of the circuit court of the United States for the northern district of California, in a case of *habeas corpus*, which determined that Lau Ow Bew, the appellant, is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein, and ordered that he be deported out of the country, and transported to the port in China whence he came.

The proceedings in the circuit court are set out in the application for the *certiorari*, as reported in 141 U. S. 583. The case was heard and determined in that court upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed that the following are the facts herein:

"1st. That the said Lau Ow Bew is now on board the steamship Oceanic, which arrived in the port of San Francisco, state of

California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

“2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

“3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, state of Oregon, under the firm name and style of Hop Chong & Co.

“4th. That said firm is worth \$40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

“5th. That said firm does a business annually of \$1,000,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars, as duties upon imports.

“6th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanic on the 11th day of August, A. D. 1891.

“7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in Section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884.”

The circuit court rendered judgment September 14, 1891 (47 Fed. Rep. 587), which, the case having been carried by appeal to the circuit court of appeals for the ninth circuit, was on the 7th day of October, 1891, affirmed. (47 Fed. Rep. 641.)

On November 16, 1891, this court, upon the application of appellant, ordered that a writ of *certiorari* issue to the circuit court of appeals requiring it to certify the case up for review and determination, under Section 6 of the act to establish circuit courts of appeals, approved March 3, 1891. (26 Stat. 826, 828, c. 517.)

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: Before proceeding to dispose of this case upon the merits the question of jurisdiction, although not argued by counsel, must receive attention.

The Act of Congress of March 3, 1891, establishing circuit courts of appeals and defining and regulating the jurisdiction of the courts of the United States, 26 Stat. 826, c. 517, was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, which impeded the examination of cases of public concern, and operated to the delay of suitors. *In re Woods*, 143 U. S. 202.

By Section 4, "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same."

By Section 14, Section 691 of the Revised Statutes, and Section 3 of the Act of February 16, 1875, c. 77, 18 Stat. c. 77, pp. 315, 316, and "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this act," were repealed.

Under Section 5, appeals or writs of error may be taken from the circuit courts directly to this court in six specified classes of cases, namely:

"(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. (2) From the final sentences and decrees in prize causes. (3) In cases of conviction of a capital or otherwise infamous crime. (4) In any case that involves the construction or application of the constitution of the United

States. (5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.”

By Section 6, the circuit courts of appeals “shall exercise appellate jurisdiction to review by appeal or by writ of error,” final decisions of the circuit courts “in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.” The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed. *McLish v. Roff*, 141 U. S. 661, 666.

The words “unless otherwise provided by law” were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause.

The section then provides that “the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of appeals of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instructions on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in

controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified" for its determination as if brought up by appeal or writ of error. "In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

By this section judgments or decrees in the enumerated classes of cases are made final in terms by way of the exclusion of any review by writ of error or appeal, while as to cases not expressly made final by the section, appeal or writ of error may be had of right, where the money value of the matter in controversy exceeds one thousand dollars besides costs.

The case before us is one of *habeas corpus*. The jurisdiction of the circuit court was not in issue, nor was the construction or application of the constitution of the United States involved, nor the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, drawn in question. It did not fall within either of the classes of cases which may be brought directly to this court under the act, and was, therefore, properly carried to the circuit court of appeals. And as a case of *habeas corpus* is not one in which the matter in controversy involves a money value, no appeal lies from that court under Section 6. *Kurtz v. Moffitt*, 115 U. S. 487. But as the decree is "made final" by the effect of the section in giving the circuit courts of appeals jurisdiction over that class of cases, we are of opinion that it is reviewable upon *certiorari*, and that this writ was providently issued.

In every case within its appellate jurisdiction, the circuit court of appeals may certify to this court any questions or propositions of law in respect of which it desires instruction, and this court may then require the whole record and cause to be sent up; and so it is competent for this court by *certiorari* to direct any case to be certified, whether its advice is re-

quested or not, except those which may be brought here by appeal or writ of error, and the latter are specified as those where the money value exceeds a certain amount, and which have not been made final "in this section," that is, made final in terms. And as *certiorari* will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision, the object of the act is thereby attained.

As Lau Ow Bew is, in our opinion, unlawfully restrained of his liberty, we reverse the judgment of the circuit court of appeals for the ninth circuit, and, as required by Section 10 of the Act of March 3, 1891, remand the cause to the circuit court of the United States for the northern district of California, with directions to reverse its judgment and discharge the petitioner.

UNITED STATES v. JAHN.

Reported in 155 U. S. 109.

(1894.)

AUGUST 15, 1890, G. A. Jahn & Co. imported into New York some casks of molasses, which on the 28th of that month they withdrew from warehouse and exported to Montreal for the benefit of the drawback. Upon such withdrawal and exportation, the collector of customs at New York exacted a charge of ten cents per cask for gauging the molasses under the provisions of Section 3023 of the Revised Statutes. The importers protested against the charge for gauging, claiming that it had been abolished by the twenty-second section of the act entitled "An act to simplify the laws in relation to the collection of the revenue," approved June 10, 1890, 26 Stat. 131, 140, c. 407.

The matter was duly taken before the board of general appraisers, which sustained the action of the collector, and the importers appealed to the circuit court of the United States for the southern district of New York. The circuit court reversed the decision of the board of general appraisers, and held that the gauging charge exacted by the collector had been abolished. Thereupon the United States appealed to the circuit court of appeals, and assigned for error that the circuit court erred in reversing the decision of the board of gen-

eral appraisers for the reason that the decision of the board was final and conclusive, and that the circuit court had no jurisdiction to make any decree or order in said proceeding. The jurisdiction of the circuit court was first challenged upon the appeal. The circuit court of appeals certified to this court the question: "Whether the United States circuit court had jurisdiction to hear and determine the questions of law and of fact involved in said decision of the board of general appraisers."

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: This case was docketed here under the title: "In the matter of the application of Gustave A. Jahn & Co. upon certain merchandise entered by the 'Alps,' August 15, 1890," but the correct title is *United States v. Gustave A. Jahn, et al.*, for the reasons given by Mr. Justice Gray in *United States v. Hopewell*, 5 U. S. App. 137.

Counsel for the importers denies that the circuit court of appeals had authority to certify the question of the jurisdiction of the circuit court to this court because that question was not in issue in the circuit court or raised in any way; and, if it had been in issue, it could only be certified by the circuit court to this court; that as it was not put in issue and not certified, and an appeal was taken to the circuit court of appeals, the action of the circuit court in proceeding to judgment was a final determination in favor of its own jurisdiction, which could not be revised by the circuit court of appeals though under instruction from this court. * * *

It thus appears that the revisory power of this court, and of the circuit courts of appeals, under the act, is to be exercised only in accordance with its provisions, and that the circuit courts of appeals exercise appellate jurisdiction under the sixth section in all cases other than those in which the jurisdiction of this court is exercised under the fifth, among which cases are included all revenue cases, that is, cases under laws imposing duties or imports or tonnage, or providing in terms for revenue (*United States v. Hill*, 123 U. S. 681), which can only come here on the merits on certificate or *certiorari*; yet if in such a case a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by

this court upon a certificate of the circuit court, while if jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the circuit court of appeals would undoubtedly have jurisdiction to review the case upon the merits. The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases, the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under Section 5. *Horner v. United States*, 143 U. S. 570, 577. The act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. By taking a case directly to this court on the question of jurisdiction, the contention on the merits would be waived, but it does not follow that the jurisdictional question could not be considered, if the case were taken to the circuit court of appeals. The act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction.

If in the case at bar the question of jurisdiction had been raised by the United States in the circuit court and the jurisdiction sustained, and the decision on the merits had then been rendered against the government, would the United States have been compelled to waive their contention on the merits and have the question of jurisdiction certified to this court, or

would they have waived the question of jurisdiction by taking the case to the circuit court of appeals? We do not think the act involves such a dilemma; but, on the contrary, are of opinion that the government would have had the right to carry the cause to the court of appeals, which could have then certified the question of jurisdiction to this court for determination. Of course, the power to certify assumes the power to decide; but if decided there, by *certiorari*, when necessary, the same review could be obtained here as on certificate for instruction. And although the question of jurisdiction was not put in issue in the circuit court, still, as the objection in the circuit court of appeals went to jurisdiction over the subject-matter, no omission in that regard could supply absolute want of power, and the circuit court of appeals was bound to take notice of the question.

It is conceded that the United States assigned errors on the merits as well as the error under consideration, and as the question of jurisdiction lay at the threshold, and the intent of the Act of March 3, 1891, was that that question should be determined by this court, the circuit court of appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate. This was in accordance with the early case of *McLish v. Roff*, 141 U. S. 661, in which it was held that the writ of error or appeal could be taken only after final judgment, except in the cases specified in Section 7 of the act, and Mr. Justice Lamar, delivering the opinion, said: "When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court." The same course was pursued in *New Orleans v. Benjamin*, 153 U. S. 411. The case was one in which the question of jurisdiction was raised in the circuit court, the jurisdiction maintained, and judgment rendered on the merits. The defendant did not ask that the question of jurisdiction be certified to this court by the circuit court, but carried the whole case to the circuit

court of appeals, and that court certified to us the questions involving the jurisdiction, which were accordingly answered.

Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it; (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court; (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error, if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits.

COLORADO CENTRAL MINING CO. v. TURCK.

Reported in 150 U. S. 138.

(1893.)

THIS was an action in ejectment brought by John Turck against the Colorado Consolidated Mining Company, December 2, 1885, in the circuit court of the United States for the district of Colorado.

The case went to trial and resulted in a verdict for the plaintiff and judgment thereon, which was set aside on payment of costs, under the local statute, and a second trial was had with the same result. Certain exceptions were taken by the defendant to parts of the charge of the court and to the refusal to give certain instructions requested. The case was taken by writ of error to the United States circuit court of appeals for the eighth circuit, and the judgment was affirmed, May 8, 1892. A petition for rehearing was filed during the term, which was denied February 18, 1893, and thereupon a writ of error was allowed to this court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: From *Wiscart v. D'Auchy*, 3 Dall. 321, to *American Construction Co. v. Jacksonville, etc., Railway Co.*, 148 U. S. 372, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of congress upon that subject.

By the Judiciary Act of March 3, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing circuit courts shall be had in this court, or in the circuit courts of appeals thereby established, according to the provisions of the act regulating the same. The writ of error in this case was brought under Section 6 of that statute, which provides that "judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states," and also that "in all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. 826, 828, Section 6, c. 517.

If the judgment of the circuit court of appeals for the eighth circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the circuit court of appeals was not final, it must appear that the jurisdiction of the circuit court

was not dependent entirely upon the opposite parties being citizens of different states.

Under the Act of March 3, 1875, 18 Stat. 470, c. 137, circuit courts of the United States had original cognizance of all suits of a civil nature at common law or in equity, among others, where the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or in which there was a controversy between citizens of different states.

This complaint was filed December 2, 1885, and alleged the diverse citizenship of the parties as the ground of jurisdiction. But it is said that the vital question raised in the case was whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of Section 2322 of the Revised Statutes, concerning the dip and apex of lodes. Hence that the suit really and substantially involved a controversy only to be determined by reference to the federal statute, and that jurisdiction existed on that ground and did not depend entirely upon the other.

To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence, or the rulings of the courts below.

This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the circuit court, is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act. * * *

The jurisdiction of the circuit court was invoked, December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could

be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The federal question now suggested did not emerge until the defendant set up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication.

The proposition that the right given by Section 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate was afterwards advanced in certain instructions requested by defendant and refused.

The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

We are of opinion that the judgment of the circuit court of appeals was final under the sixth section, and that the writ of error can not be maintained. *Writ of error dismissed.*

Affirmed and applied in *Borgmeyer v. Idler*, 159 U. S. 408, in which it was held that a suit for money received as an award under a treaty between the United States and Venezuela does not under the allegations draw in question in any manner the validity or construction of the treaty and hence does not involve a federal question.

PRESS PUBLISHING CO v. MONROE.

Reported in 164 U. S. 105.

(1896.)

THIS was an action brought in the circuit court of the United States for the southern district of New York by Harriet Monroe against the Press Publishing Company for the wrongful publication of an unpublished manuscript.

The complaint alleged that the plaintiff was a citizen of the state of Illinois, and a resident in the city of Chicago;

and that the defendant was a citizen of the state of New York, a resident in the city of New York, and a corporation created and existing by force of and under the laws of that state, and having its chief place of business in that city, and its business that of editing, publishing, selling and distributing a newspaper called "The World."

The complaint further alleged that prior to September, 1892, the plaintiff had composed and written out in manuscript, but had not published, a lyrical ode, the work of her intellect and imagination; that on September 23, 1892, a committee of the World's Columbian Exposition made an agreement with the plaintiff, whereby, for a good consideration, they were licensed by her to use the ode, for the purpose of having it read or sung, or partly read and partly sung, on the public occasion of the dedicatory ceremonies of that exposition in the city of Chicago on October 21, 1892; that the general ownership of the literary production, with the right of unlimited publication after that date, remained in the plaintiff; that during the ten days preceding said 23d of September, she delivered to the committee the manuscript of the ode, for the purpose expressed in the agreement of license, and with the injunction that the manuscript should be held secret, in order that the plaintiff's right of property should be preserved inviolate, and especially that premature publication should be avoided; and that the utmost care was taken, both by the plaintiff and by the committee, to prevent or forestall piratical attempts on the part of newspapers; but that the defendant, through its officers and agents, between September 14 and September 23, 1892, surreptitiously obtained from the rooms of the committee the manuscript, or a copy thereof, and sent the same to its office in New York, and, disregarding a protest sent by the plaintiff by telegraph published in its paper of September 25 the ode, with many errors, making portions of the poem appear meaningless, and with a grotesquely incorrect analysis, calculated to produce a false and ludicrous impression of the work; and that these wrongful acts of the defendant deprived the plaintiff of gains she would otherwise have received from the sale of the ode, and damaged her reputation as an author, and were a willful, wanton

and unlawful trespass upon her rights, and subjected her to shame, mortification and great personal annoyance; and alleged damages in the sum of \$25,000.

A motion by the defendant, at the commencement of the trial, to compel the plaintiff "to elect between the two causes of action set forth in the complaint," was denied by the court as immaterial, because the plaintiff's counsel declared in open court that "there is but one cause of action stated in the complaint, to wit, literary piracy of a manuscript before publication, and a violation of a common law right."

* * * The jury returned a verdict for the plaintiff in the sum of \$5,000, and judgment was rendered thereon, which was affirmed by the circuit court of appeals. 38 U. S. App. 410. The defendant thereupon sued out the present writ of error, and a motion was now made to dismiss it for want of jurisdiction.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court: * * *

This plaintiff in error, having been defeated in the circuit court, did not bring the case directly to this court, as one involving the construction or application of the constitution of the United States, or upon any other of the grounds specified in Section 5 of the Act of 1891. But it took the case, under Section 6, to the circuit court of appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the circuit court of appeals.

The judgment of the circuit court of appeals being made final in all cases in which the jurisdiction of the circuit court is dependent entirely upon the parties being citizens of different states, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds one thousand dollars, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the circuit court wholly depended upon the parties being citizens of the different states.

The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than two thousand dollars, showed that the circuit court had jurisdiction of the case by reason of the parties being citizens of different states. The plaintiff, in her complaint, did not claim any right under the constitution and laws of the United States, or in any way mention or refer to that constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Co. v. Turck*, above cited, is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the circuit court of appeals.

The jurisdiction of the circuit court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the circuit court of appeals was final, and the writ of error must be *dismissed for want of jurisdiction*.

In accord, see *Ex parte Jones*, 164 U. S. 691.

AMERICAN SUGAR REFINING COMPANY v. NEW ORLEANS.

Reported in 181 U. S. 277.
(1901.)

THIS was a petition for a writ of *certiorari* requiring the United States circuit court of appeals for the fifth circuit to certify to this court for its review and determination the case of the *American Sugar Refining Company*, Plaintiff in Error, v. *The City of New Orleans*, Defendant in Error, No. 920, November term, 1899; or in the alternative for a writ of mandamus to command the judges of said court to hear, try and adjudge said cause.

The petition alleged that on June 14, 1899, the city of New Orleans brought suit by rule in the civil district court for the parish of Orleans, Louisiana, against the American Sugar

Refining Company for a city license tax for the year 1899 for the sum of \$6,250 with interest thereon claiming said license tax solely by virtue of the laws of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar and molasses in that city; that the American Sugar Refining Company petitioned the district court for an order removing the suit to the circuit court of the United States for the eastern district of Louisiana, the petition for removal being based solely upon the ground that the defendant was a corporation of New Jersey, and the plaintiff, a corporation of Louisiana, which petition was granted, the bond required given, a certified copy of the record filed, and the suit docketed in the circuit court.

That thereafter, by order of the court, the city reformed its pleadings in some parts, "the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the formal prayer for a recognition of a lien and privilege on defendant's property, and for an injunction against defendant carrying on its business."

That the defendant answered:

"First. That it was a manufacturer, and as such exempt from license taxation under Article 229 of the constitution of the state of Louisiana of 1898, which exempts all manufacturers from state and municipal license taxation, except those of distilled, alcoholic and malt liquors, tobacco, cigars and cottonseed oil; and

"Second. That the ordinance of the city of New Orleans under which said tax was claimed was based upon an Act No. 171 of the general assembly of Louisiana of 1898, and that the said act was in contravention of the fourteenth amendment to the constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and thereby sought to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the state of Louisiana; and that the said act and city

ordinance based thereon were therefore unconstitutional and void as to defendant.”

That the suit was tried before the court and a jury, and evidence was adduced showing the nature and character of defendant's business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; and also showing that the gross receipts of defendant's business were of such amount that if liable at all for license tax, it was liable for the sum claimed; and defendant also filed an exception of no cause of action.

That at the close of the evidence defendant requested the court to direct the jury to render a verdict in its favor which the court refused to do, and charged in plaintiff's favor, and plaintiff obtained a verdict and judgment. On defendant's application a bill of exceptions was duly settled and signed by the presiding judge; and the case carried on error to the United States circuit court of appeals for the fifth circuit. The cause was there heard, and on May 29, 1900, judgment was rendered by the circuit court of appeals dismissing the writ of error on the ground of want of jurisdiction. 104 Fed. Rep. 2. Petitioners thereupon applied for a rehearing, which was denied November 20, 1900.

Petitioner prayed for the writ of *certiorari*, or for the writ of mandamus as before stated. Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: The jurisdiction of the circuit court rested on diverse citizenship, and not on any other ground, and had the circuit court of appeals gone on and decided the case, its decision would have been final, and our interposition could only have been invoked by *certiorari*.

This was so, notwithstanding one of the defenses was the unconstitutionality of the ordinance. *Colorado Central Mining Co. v. Turek*, 150 U. S. 138; *Press Publishing Co. v. Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691. These, and many other cases to the same effect, related to the appellate jurisdiction of this court over the court of appeals under the sixth section of the Judiciary Act of March 3, 1891, but they neces-

sarily involved consideration of our jurisdiction under the fifth section, and that of the court of appeals under the sixth section. By the fifth section appeals or writs of error may be taken from the district or circuit courts direct to this court in any case that "involves the construction or application of the constitution of the United States;" "in which the constitutionality of any law of the United States, or the validity of construction of any treaty made under its authority, is drawn in question;" "in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section six provides that the circuit courts of appeals shall exercise appellate jurisdiction to review the final decisions of the district and circuit courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different states." The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court attaches solely by reason of diverse citizenship, it follows that the court of appeals has power to review the judgment of the circuit court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the circuit court attached, by reason whereof the case became embraced by Section 5.

Thus it was held in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, where the jurisdiction of the circuit court rested on diverse citizenship, but the state statute involved was claimed in defense to be in contravention of the constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the circuit court, although it was also ruled that the plaintiff might have carried the case to the circuit court of appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the circuit court.

The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final it is provided that "there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

And the right to two appeals would exist in every case (the litigated matter having the requisite value), where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the constitution, laws or treaties of the United States, if such cases could be carried to the circuit court of appeals, for their decisions would not come within the category of those made final.

As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the constitution, or some law, or treaty of the United States, *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Western Union Telegraph Co. v. Ann Arbor Railroad Company*, 178 U. S. 239; and as those cases fall strictly within the terms of Section 5, the appellate jurisdiction of this court in respect of them is exclusive.

If plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in *Colorado Central Mining Co. v. Turck*, 150 U. S. 138, and the case is taken to the court of appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error would lie under the last clause of Section 6, because the jurisdiction would not depend solely on diverse citizenship. *Union Pacific Railway Company v. Harris*, 158 U. S. 326.

In *Carter v. Roberts*, 177 U. S. 496, we said: "When cases arise which are controlled by the construction or application of

the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a state is claimed to be in contravention of the constitution of the United States; the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in Section 5 may have so arisen that a direct resort to this court might be had does not deprive the court of appeals of jurisdiction or justify it in declining to exercise it.

In the case at bar, the jurisdiction rested on diverse citizenship. Two defenses were interposed, one of which asserted exemption from the license tax, and the other denied the constitutionality of the legislation under which the tax was imposed. Both defenses were overruled, and judgment rendered for the plaintiff. The case was then carried on error to the circuit court of appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a *certiorari* should issue that its judgment to that effect may be revised. As the record is before us on the return to the rule hereinbefore entered, and full argument has been had, it will be unnecessary for another return to be made to the writ, or further argument to be submitted.

Writ of *certiorari* to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause.

Mr. Justice Gray concurred in the result.

HUGULEY MFG. CO. v. GALETON MILLS.

Reported in 184 U. S. 290.

(1902.)

THIS was a bill filed in the United States circuit court for the northern district of Georgia, January 21, 1891, by J. J. Robinson as trustee, who averred that he was "a citizen of and resided in the state of Alabama," "against the Alabama and Georgia Manufacturing Company, a corporation created under and by virtue of the laws of the state of Georgia and a resident and citizen of said northern district of Georgia; and against the Huguley Manufacturing Company, a corporation created under the laws of said state of Georgia, and a resident and citizen of said state of Georgia, and of the northern district of said state; and against W. T. Huguley, whom your orator avers to be a citizen of said state of Georgia and residing within the said northern district of Georgia."

The bill averred that on January 2, 1884, "the said Alabama and Georgia Manufacturing Company executed and delivered to said W. T. Huguley, W. C. Yancey, and your orator, as trustees, a certain deed of trust, conveying to said persons named, and to orator, all the property of the said Alabama and Georgia Manufacturing Company upon the terms and upon the trusts therein stated for the purpose of securing certain negotiable bonds of said company in the principal sum of sixty-five thousand dollars, and interest thereon, which deed of trust was accepted by said trustees and duly recorded." A copy of the trust deed was attached and conveyed certain real estate in the state of Georgia and certain real estate in the state of Alabama as therein described.

It was further averred that the bonds were duly issued by the Alabama and Georgia Manufacturing Company and sold or otherwise disposed of; that the company was insolvent and had ceased to do business; that under and by virtue of a decree in chancery of the superior court of Troup county, Georgia, all the

property of the manufacturing company covered by the deed of trust had been sold and purchased by certain persons who afterwards conveyed the same to the Huguley Manufacturing Company, and that the last-named corporation was now in the possession of the same; that the sale was made subject in all respects to the rights and lien of trust deed for the holders of the first mortgage bonds; that W. T. Huguley, defendant herein, and named as one of the trustees for said bondholders, was interested in the purchase of said property, and in the property and assets of the Huguley Manufacturing Company, and adversely to complainant as trustee for said bondholders, and that the other trustee, W. C. Yancey, had departed this life since the execution and delivery of the deed of trust.

The bill then set up default on the part of the Alabama and Georgia Manufacturing Company in the payment of interest; the election of a majority of the bondholders to treat the whole of the principal sum named in the bonds as due; request of complainant to begin proceedings to secure the property pledged for the payment of the indebtedness, and which he deemed to "the best interest of the bondholders;" and prayed for an accounting, foreclosure, and sale of the property.

Defendants acknowledged service, and the two defendant companies filed a demurrer to the bill, which was subsequently overruled on hearing, Mr. Justice Lamar presiding. 48 Fed. Rep. 12. Answer was filed by these defendants and the bill taken as confessed as to W. P. Huguley. The cause subsequently went to final decree adjudging recovery on all the bonds and of foreclosure and sale, which decree was afterwards reversed by the circuit court of appeals for the fifth circuit, 56 Fed. Rep. 690, because all the bonds were not due, acceptance of interest on some of them having waived default, and the cause remanded. Pending the appeal the property was purchased for the bondholders under the decree and \$10,000 paid into court by the purchasers as required by the decree, who organized a company under the name of the Galetton Cotton Mills, which corporation was placed in possession of the property and remained in such possession for a period of three years and six months. The decree of foreclosure having been vacated, the circuit court granted a petition on behalf of the Huguley Manufacturing

Company to restore it to the possession of the property, on condition however that it pay into court the \$10,000 which had been paid in by the purchasers. The Huguley Manufacturing Company did not comply with this condition, and a second decree of foreclosure was entered adjudging that, out of a total of one hundred and thirty bonds, ninety were due when the bill was filed, and forty were not then due because of waiver of default, though now due; that the property was indivisible and could not be sold to satisfy part of the bonds only; and that the proceeds of sale should be proportionately distributed on all the bonds. Thereupon an appeal was taken to the circuit court of appeals, and the decree of the circuit court was affirmed. 72 Fed. Rep. 708.

A second foreclosure sale took place and the property was again purchased for the bondholders, and this sale was confirmed June 25, 1896. Defendants filed a petition for an accounting of the rents and profits from the time of the first sale, and an amendment thereto, and a reference was made to a special master, who on November 2, 1897, filed his report in which he found the Galetton Cotton Mills liable for rents and profits in the sum of \$39,715.31. Exceptions were filed to the master's report by both parties. February 23, 1898, the exceptions of appellants were overruled and the exceptions of appellees sustained to the extent of reducing the master's finding to \$35,857.54, and a decree to that effect was entered February 28, 1898. Thereafter the circuit court entered a decree that the rents and profits should be used in reduction of the mortgage debt and costs and directing the manner of applying thereto the rents and profits and the amount of cash already received and reserving all questions of costs and expenses not therein disposed of. 89 Fed. Rep. 218. At the last foreclosure sale a balance was left due on the trust deed of \$33,414.21. September 22, 1898, the purchaser at the second sale petitioned for a final conveyance, and on October 15, 1898, a decree was entered directing the completion of the sale by a cash payment, and conveyance. A motion was made to set aside this decree, which was overruled, whereupon an appeal was taken to the circuit court of appeals. The appeal was heard, and the decree of the circuit court was on May 16, 1899, affirmed, 94 Fed. Rep. 269.

Application was made to this court for a *certiorari*, which was denied October 30, 1899. 175 U. S. 726. May 12, 1900, an appeal to this court was allowed by Pardee, J., in order to preserve any possible rights of the applicants, although he expressly stated that he seriously doubted the right of appeal. Appellees moved to dismiss the appeal, the consideration of which motion was postponed to the hearing on the merits.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: The Act of March 3, 1891, c. 517, 26 Stat. 826, provides in Section 6 that the circuit courts of appeals shall have appellate jurisdiction to review judgments and decrees of the circuit courts in all cases in which a direct appeal is not allowed by Section 5 to this court, and that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

The jurisdiction referred to is the jurisdiction of the circuit court as originally invoked. *Colorado Central Mining Co. v. Turck*, 150 U. S. 138; *Press Publishing Company v. Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691; *American Sugar Refining Company v. New Orleans*, 181 U. S. 277; *Arkansas v. Kansas & Texas Coal Company*, 183 U. S. 185.

If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in Section 5, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb v. Columbia Trustees*, 179 U. S. 472. If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Company v. New Orleans*, 181 U. S. 277.

The general intention of the act was to distribute the appellate jurisdiction and to permit an appeal to only one court. *Robinson v. Caldwell*, 165 U. S. 359.

In this case appellants did not attempt to take an appeal directly to this court from the circuit court, nor could they have done so since no question was so raised as to bring the case within either of the classes named in Section 5. *Cornell v. Green*, 163 U. S. 75. The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals can not be regarded otherwise than as made final by the statute.

The question before us is whether this appeal was properly granted and can be maintained. In all cases where the decree or judgment of the circuit court of appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by *certiorari* or otherwise." The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be *ejusdem generis* with *certiorari*. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.

The record filed in this case June 25, 1900, was entirely insufficient, and appellants applied for *certiorari* to perfect it by bringing up the alleged lacking portions. We granted that application, and the omissions were supplied. This auxiliary writ did not operate to bring the case before us or in itself to add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken. Many matters are urged, such as alleged lack of indispensable parties below and so on, as reasons why an appeal ought to lie, but our jurisdiction depends on the statute and can not be enlarged by the supposed hardship of particular cases. Finally, it is argued that a large part of the property dealt with by the decree is situated in the state of Alabama and it is said that therefore the decrees of both courts are void for want of jurisdiction over the subject-matter.

As the circuit court had jurisdiction over the mortgagor company, the company claiming under it, and the surviving cotrustee of complainant, and the trust deed was made and executed in Georgia, where part of the property was situated, the courts below may have assumed that the case came within *Muller v. Dows*, 94 U. S. 444; *International Bridge Tramway*

Company v. Holland Trust Company, 52 U. S. App. 240; and kindred cases.

But we need not discuss the validity of the decrees in this regard. If the point had been raised in the circuit court and its decision would have justified an appeal directly to this court, no such appeal was taken. If its existence in the record justified a review of the decree of the circuit court of appeals, the proper course was to apply for a *certiorari*. That course was taken in this case, and the application was denied. In view of repeated and well-considered decisions of this court, some of which we have cited, we are unable to find any grounds on which this appeal can be sustained. *Appeal dismissed.*

In *Ayres v. Polsdorfer*, 187 U. S. 585, the court reviews earlier cases and concludes, at p. 590: "Therefore when the jurisdiction of the circuit court is invoked solely on the ground of diversity of citizenship two classes of cases can arise, one in which the questions expressed in Section 5 appear in the course of the proceedings and one in which other federal questions appear. Cases of the first class may be brought to this court directly or may be taken to the circuit court of appeals. But if taken to the latter court they can not then be brought here. Cases of the second class must be taken in the circuit court of appeals and its judgment will be final. The case at bar falls under one or under the other of those classes."

MACFADDEN v. UNITED STATES.

Reported in 213 U. S. 288.
(1909.)

MR. JUSTICE MOODY delivered the opinion of the court: The petitioner, Bernarr Macfadden, was indicted in the district court of the United States for the district of New Jersey for mailing obscene literature, in violation of Section 3893 of the Revised Statutes. He pleaded not guilty, and upon trial before a jury was found guilty.

Various questions of law arose in the course of the trial, which need not be stated.

After the evidence was concluded the petitioner presented to the presiding judge many requests for instructions to the jury, which were refused, under exception. For the purposes of this case four only need to be referred to, and they summarily. The judge was requested to rule that the statute under which the indictment was returned was unconstitutional; (a) because it

abridged the freedom of the press; (b) because it was uncertain and created no general rule of conduct, and therefore the indictment was without due process of law; (c) because it was an *ex post facto* law; (d) because it delegated legislative power to the court or jury.

There was a motion in arrest of judgment, which was overruled. Thereupon judgment was entered, and the petitioner sued out a writ of error to the circuit court of appeals for the third circuit. That court affirmed the judgment.

After a denial of a petition for a writ of *certiorari* the petitioner made application to one of the justices of this court for a writ of error, directed to the circuit court of appeals. The question of the right of the petitioner to such a writ of error has been referred to the full court, and, by direction of the court, briefs on the part of the United States and the petitioner have been filed and considered.

The object of the Act of March 3, 1891, c. 517, 26 Stat. 826, was to distribute the appellate jurisdiction of the supreme court between it and the newly-created circuit courts of appeal, and to abolish the appellate jurisdiction of the circuit courts. The first necessary step in this undertaking was to determine in what cases appeals (using the word in its broader sense) might be taken directly to this court. This was done in Section 5, which is as follows:

“SECTION 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

“In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.

“From the final sentences and decrees in prize causes.

“In cases of conviction of a capital or otherwise infamous crime.

“In any case that involves the construction or application of the constitution of the United States.

“In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

“In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.”

Clause 3 of this section has been amended by the Act of January 30, 1897, c. 69, 29 Stat. 492 by striking out the words “or otherwise infamous.”

Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a writ of error might have been sued out originally directly from this court under clause 5. *Loeb v. Columbia Township Trustees*, 179 U. S. 472. But this was not done, and by the appeal to the circuit court of appeals the right of direct appeal here was lost. *Robinson v. Caldwell*, 165 U. S. 359.

SECTION 6 of the act provides that the circuit courts of appeal shall exercise appellate jurisdiction “in all cases other than those provided for in the preceding section of this act,” and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the circuit court of appeals of its jurisdiction. *American Sugar Co. v. New Orleans*, 181 U. S. 277. In the case at bar the circuit court of appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the circuit court of appeals was final. The act contemplated that certain judgments of the circuit court of appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in Section 6 of the act. It is to be observed that the line of division between cases appealable directly to this court and those appealable to the circuit court of appeals, made by Section 5 of the act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the circuit court of appeals to this court and those not so appealable, drawn by Section 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court, whether the jurisdiction rests upon the character of

the parties or the nature of the case. *Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290, where it was said by the chief justice, citing cases, "The jurisdiction referred to is the jurisdiction of the circuit court as originally invoked." The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the circuit court of appeals to this court, is important, and a neglect to observe it leads to confusion.

The statute says that the judgment of the circuit court of appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars.

As this is a case arising under the criminal laws, the judgment of the circuit court of appeals rendered within its lawful jurisdiction is, by the very terms of the act, final. And so it was held in *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, this court saying, through the chief justice: "Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under Section 5 of that act: but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court," and the writ of error to the circuit court of appeals was accordingly dismissed. Unless this case has been overruled, it governs the case at bar.

But it is argued that the right to this writ of error is supported by the decision of this court in *Spreckles Sugar Refining Co. v. McClain*, 192 U. S. 397. An examination of that case however, shows that the exact decision has no relevancy to the question now before us. The language of the opinion should be

interpreted in the light of the facts of the case. The plaintiff there brought an action against the collector of internal revenue to recover certain taxes imposed by the revenue laws of the United States, paid by it under protest. The plaintiff's claim as stated in his declaration was twofold; first, that the taxes were not due under the act as properly construed; and, second, that the act itself was unconstitutional. The jurisdiction, therefore, of the trial court was invoked upon two grounds; first, because it was a revenue case; and, second, because it arose under the constitution and laws of the United States (25 Stat. 433), which means that the plaintiff's case thus arose. *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149, and cases cited. Judgment went against the plaintiff, and it was affirmed by the circuit court of appeals. A writ of error from this court to the circuit court of appeals was sued out, and the question was whether it would lie. That question, as we have seen it, is determinable by the jurisdiction of the trial court. If the jurisdiction depended solely upon the fact that it was a case arising under the revenue laws the judgment of the circuit court of appeals was a final judgment. If, on the other hand, the jurisdiction depended solely upon the fact that it was a case arising out of the constitution or laws of the United States, the jurisdiction of the circuit court of appeals was not final, and it was reviewable upon the writ of error as matter of right in this court.

Here was a case, then, which in one aspect of the jurisdiction was reviewable by this court and in another aspect of the jurisdiction was not reviewable here. The precise case had not arisen before, and the statute was silent upon it. It was held that the writ of error could be maintained, as the jurisdiction of the trial court did not depend solely upon grounds which by the terms of the act would have made the judgment of the circuit court of appeals final, but depended also upon grounds which would have permitted a writ of error from this court to the circuit court of appeals. That this was the precise ground of the decision is clear from the whole trend of the reasoning and from the statement in the opinion, p. 410, that "the judgment of the circuit court of appeals is not final, within the meaning

of the sixth section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the constitution or the constitutionality of an act of congress." The case decides nothing more than that where the jurisdiction of the trial court is shown by the plaintiff's statement of his own case to rest upon two distinct grounds; first, a ground where the appellate jurisdiction of the circuit court of appeals was made final by the statute; and, second, a ground where the appellate jurisdiction of the circuit court of appeals was made by the statute reviewable in this court, the latter ground of jurisdiction would control and the writ of error to the circuit court of appeals would lie. Thus construed, the case is consistent with all the decisions and has no application here, because the only ground of jurisdiction of the district court in the case at bar was that it was a case arising under the criminal laws. In such a case the statute makes the judgment of the circuit court of appeals final, and it is no less final because the petitioner here might, if he had been so advised, originally have invoked directly, under Section 5 of the act, the appellate jurisdiction of this court.

We are of the opinion that the writ of error does not lie, and the application for it is *denied*.

WEIR v. ROUNTREE.

Reported in 216 U. S. 607.

(1910.)

PER CURIAM: Bill was filed by the express company to restrain Mrs. Rountree from bringing suit against the company, which was directed to be dismissed for want of jurisdiction because there was no diversity of citizenship and no federal ground for jurisdiction. *Rountree v. Adams Express Co.*, 165 Fed. Rep. 152. From this decree no appeal was taken.

A second suit on the same alleged cause of action was then brought in the name of the officers of the company, Levi C. Weir and others, alleging their diverse citizenship. The second suit was dismissed by the circuit court and carried to the circuit

court of appeals for the eighth circuit, and the latter court affirmed the decree of the circuit court. *Weir v. Rountree*, 173 Fed. Rep. 776.

This appeal was then prosecuted, but we are of opinion that it can not be maintained. *Colorado Central Consolidated Mining Co. v. Turck*, 150 U. S. 138; *Bagley v. General Fire Extinguisher Co.*, 212 U. S. 477. If the allegations which set up diversity of citizenship were stricken from the bill, the federal court would have had no jurisdiction. Being relied on, the decree of the circuit court of appeals was final. *Appeal dismissed.*

c. Cases not made final.

UNION PACIFIC RAILWAY CO. v. HARRIS.

Reported in 158 U. S. 326.

(1895.)

THIS was an action brought in the circuit court of the United States for the district of Colorado by Robert E. Harris against the Union Pacific Railway Company to recover for personal injuries received by him while he was a passenger on defendant's train. Plaintiff recovered judgment in the circuit court and the defendant sued out a writ of error from the circuit court of appeals for the eighth circuit, by which the judgment was affirmed. 63 Fed. Rep. 800. A writ of error from this court was allowed and the cause having been docketed, motions to dismiss or affirm were submitted.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: The complainant alleged Harris to be "a citizen of the state of Colorado." and complained of "the Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha and state of Nebraska, and is now and was at the time and times hereinafter stated, a citizen of the state of Nebraska." The motion to dismiss is made upon the ground that the judgment of the circuit court of appeals was final, inasmuch as the jurisdiction was dependent upon the opposite parties being citizens of different states. As, however, the judgments of the circuit courts of appeals are final in this class of cases **only**

when the jurisdiction is dependent "entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states," plaintiff in error insists that this judgment was not final, since the jurisdiction depended not solely on diverse citizenship, but also upon the fact that plaintiff in error was a federal corporation.

In *Northern Pacific Railroad Company v. Amato*, 144 U. S. 465, a suit was brought in the supreme court of New York against the railroad company to recover damages for personal injuries sustained by the plaintiff, and was removed by the defendant into the circuit court of the United States for the southern district of New York on the ground that it arose under an act of congress in that the defendant was a corporation created thereby, and a writ of error to the circuit court of appeals for the second circuit was sustained. In that case the citizenship of the plaintiff was not mentioned in the complaint or in the petition for removal and the petition stated that the action arose under an act of congress. It was accordingly held that the judgment of the circuit court of appeals was not made final by Section 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826. In the present case jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of plaintiff in error, no federal question arose. It is not for us to inquire why writs of error to circuit courts of appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it. But this brings us to the motion to affirm, which, as we do not need further argument, we proceed to dispose of.

AZTEC MINING COMPANY v. RIPLEY.

Reported in 151 U. S. 79.

(1894.)

MR. CHIEF JUSTICE FULLER delivered the opinion of the court: Judgment was recovered in the district court for the third judicial district, within and for the county of Grant, in the territory of New Mexico, on May 26, 1891, by John W. Ripley against the Aztec Mining Company for the sum of \$1,657.51 damages and costs, and affirmed on error by the supreme court of that territory, August 19, 1891. The mining company thereupon sued out a writ of error from the United States circuit court of appeals for the eighth circuit, which was dismissed for want of jurisdiction. *Aztec Mining Co. v. Ripley*, 10 U. S. App. 383. A writ of error was thereupon allowed from this court and comes before us upon a motion to dismiss or affirm.

By the fifteenth section of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, the circuit courts of appeals, in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the supreme courts of the several territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and citizens of the United States, or between citizens of different states, it did not belong to either of the classes defined by Section 6 of that act, as cases in which the judgments or decrees of the circuit courts of appeals should be final, and therefore the circuit court of appeals for the eighth circuit properly declined to take jurisdiction.

The last paragraph of the section provides that "in all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States, when the matter in controversy shall exceed one thousand dollars besides costs;" and as this case was not made final by that section, a writ of error would lie were it not that under Section 15 that court had no jurisdiction to review the judgment.

As, however, in any case made final, the section made it competent for this court to require, by *certiorari* or otherwise, such case to be certified for its review and determination with the

same power and authority in the case as if it had been brought up by appeal or writ of error; and as the paragraph quoted gave the appeal or writ of error as of right in cases not made final, we are of opinion that it may be properly held that it was the intention of congress that jurisdiction might be entertained by this court to pass upon the jurisdiction of that court when involving the question of the finality of its judgment under Section 6. We have already held that an appeal or writ of error lies to this court from or to the decrees or judgments of the supreme court of the territories, except in cases susceptible of being taken to the circuit courts of appeals, and cases where the matter in dispute exclusive of costs does not exceed the sum of five thousand dollars. *Shute v. Keyser*, 149 U. S. 649.

Tested by that rule this case could not have been brought to this court, and as we are clear that the circuit court of appeals for the eighth circuit rightly decided that it had no jurisdiction, it could not be brought to that. *Judgment affirmed.*

For this appeal the constitutional question must appear in the complaint and be adequate to sustain jurisdiction in trial court if averments of diversity of citizenship should be disregarded. *Roman Catholic Church v. Penn. R. R. Co.*, 237 U. S. 575; (S. C. 207 Fed. 897) (*Roman Catholic Church v. Penn. R. R. Co.*, 207 Fed. 897).

In *Merriam Co. v. Syndicate Pub. Co.*, 237 U. S. 618; (S. C. 207 Fed. 515) (*Merriam Co. v. Syndicate Pub. Co.*, 207 Fed. 515), averments of unfair trade give no jurisdiction to supreme court on appeal from circuit court of appeals, where jurisdiction is based solely on diversity of citizenship, although averments of federal question are made, but the latter is frivolous or foreclosed by former adjudication of supreme court.

OHIO RAILROAD COMMISSION v. WORTHINGTON.

Reported in 225 U. S. 101.

(1912.)

MR. JUSTICE DAY delivered the opinion of the court: The case originated in a bill filed in the United States circuit court for the northern district of Ohio, eastern division, against the railroad commission of Ohio and other parties to enjoin the enforcement of an order of the commission fixing and establishing a rate of seventy cents a ton on what is called "lake-cargo coal," transported from the Number Eight Coal Field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie,

for carriage thence by lake vessels. A permanent injunction was granted in the circuit court against the enforcement of the rate, on the ground that it was a regulation of interstate commerce. An appeal was taken to the circuit court of appeals for the sixth circuit, and that court affirmed the decree of the circuit court. (187 Fed. Rep. 965.) From the decree of the circuit court of appeals an appeal was taken to this court. An appeal was also prayed and allowed from the circuit court directly to this court, being case No. 505 on the docket of this term, which is submitted with the present case. A petition for a writ of *certiorari* to the decree of the circuit court of appeals has also been filed and submitted upon briefs.

The first question to be dealt with is one of jurisdiction. The question of the jurisdiction of the circuit court of appeals was raised and decided in that court, which held that it had jurisdiction of the case, also intimating that there were grounds of jurisdiction which might have warranted a direct appeal to this court, and that court allowed the present appeal to this court.

The argument that the jurisdiction of the circuit court of appeals is final is based upon the contention that, as Worthington, the complainant in the present case, was appointed receiver of The Wheeling & Lake Erie Railroad Company in a suit in equity in the circuit court of the United States for the northern district of Ohio, eastern division, wherein jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the original case, therefore, under the Circuit Court of Appeals Act, the decree of the court of appeals is final. It is undoubtedly true that in cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247, and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the circuit court, shows, that the order of the commission was attacked, not only upon the ground that its

findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the federal constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the federal constitution and rights secured thereby. The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Macfadden v. United States*, 213 U. S. 288.

The question then is: Is this one of the cases made final in the circuit court of appeals by the act creating that court? The sixth section of that act provides that the judgment of the circuit court of appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of \$5,000. The case is therefore one not made final in the circuit court of appeals, and the appeals to this court was properly allowed. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397; *Macfadden v. United States*, 213 U. S. 288, 294; *Standard Paint Co. v. Trinidad Asphalt Manufacturing Company*, 220 U. S. 446, 460.

Case No. 505 is dismissed and the petition for writ of *certiorari* is denied.

In *Howard v. United States*, 184 U. S., p. 681, it is said: "It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon federal grounds. And as the case was one which could not have been brought here directly from the circuit court, the final judgment of the circuit court of appeals could be reviewed in this court upon writ of error sued out by the defendants."

In *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, involving trade mark and unfair competition, there was diversity of citizenship and jurisdictional amount, it was decided that an appeal lay from the circuit court of appeals on the question of unfair competition.

In *Colombia v. Canca Company*, 190 U. S. 524, a South American State sued a West Virginia company to set aside an award of an arbitration commission, and on appeal to the circuit court of appeals, thence to the supreme court, the supreme court held that such case was not one made final in the circuit court of appeals, since one of the parties was a foreign state, and Section 6 of the Act of 1891 did not apply.

Where a case arises only under the laws of the United States, although constitutional questions arise during the further proceedings, yet, on appeal to the circuit court of appeals, the judgment there is final. See *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427.

But if a case arises under a law of the United States and the question of the constitutionality of such law is also raised by the plaintiff at the outset, if appealed to circuit court of appeals, an appeal will lie as of right, thence to the supreme court. See *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

"Was the judgment of the circuit court subject to review only by this court, or was it permissible for the plaintiff to take it to the circuit court of appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the constitution of the United States, this court alone would have had jurisdiction to review the judgment of the circuit court. *Huguley Mfg. Co. v. Galton Cotton Mills*, 184 U. S. 290, 295. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the circuit court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the Act of 1891, and, consequently, could not have come here directly from the circuit court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the constitution, the circuit court of appeals had jurisdiction to review the judgment of the circuit court, although if the plaintiff had elected

to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the circuit court, or, at its election, to go to the circuit court of appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the circuit court of appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to this court. *Robinson v. Caldwell*, 165 U. S. 359; *Loeb v. Columbia Township Trustees*, 179 U. S. 472; *Ayers v. Polsdorfer*, 187 U. S. 585.

"It remains to inquire whether the judgment of the circuit court of appeals was so far final, within the meaning of the sixth section of the Act of 1891, that it could not be reviewed here as of right upon writ of error. Can the judgment of that court in this case be re-examined here in any way except upon writ of *certiorari* granted by this court? The government insists that it can not, because the case—to use the words of the sixth section of the Act of 1891—is one 'arising * * * under the revenue laws.' So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the Act of 1891, we are of opinion that the position of the government on this point can not be sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words 'arising * * * under the revenue laws,' in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act. We do not think that the words quoted necessarily embrace a case carried to the circuit court of appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the constitution, or upon the constitutionality of an act of congress. We lean to that interpretation of the act which enables the defeated party in such a case in the circuit court of appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon the application or construction of the constitution, or upon the constitutionality of any act of congress drawn in question."

Federal question may be introduced into plaintiff's case by amendment of bill of complaint, for purposes of jurisdiction on appeal. *Vicksburg v. Henson*, 231 U. S. 259.

For discussion of the Sherman Act, and right of the United States to appeal in criminal prosecution thereunder to supreme court, see *United States v. Winslow*, 227 U. S. 202, holding that Act of March 2, 1907, 34 Stat. 1246, conferring right to appeal from district or circuit court was not repealed by Judicial Code.

For appellate jurisdiction of supreme court in trade mark matters, see *Elgin Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Warner v. Searle-Hereth Co.*, 191 U. S. 195.

4. SUPREME COURT.

a. Appeal by party of right.

(a) From district court.

HORNER v. UNITED STATES, No. 2.

Reported in 143 U. S. 570.

(1892.)

MR. JUSTICE BLATCHFORD delivered the opinion of the court: On the 10th of August, 1891, a post office inspector of the United States made complaint on oath before John A. Shields, a United States commissioner for the southern district of New York, that, on the 29th of December, 1890, Edward H. Horner, of New York City, unlawfully deposited, and caused to be deposited in the post office of that city, in the state of New York, and in the southern district of New York, a certain circular, to be conveyed and delivered by mail, which, in the contents thereof, thereafter set forth in the complaint, concerned a lottery, and which was then and there addressed to Joseph Ehrman, 70 Dearborn Street, Chicago, Illinois, and was enclosed in an envelope, with postage thereon prepaid, and carried by mail, and that the circular contained, among other things, what is set forth in the margin, the further contents of the complaint being also set forth therewith.

On the same day the commissioner issued a warrant to the marshal, commanding him to arrest Horner and bring him before the commissioner. This was done, and Horner demanded an examination on the charge, which was had and completed; and the commissioner then certified that it appeared to him, from the testimony offered, that there was probable cause to believe Horner guilty of the offense charged in the warrant, and he committed Horner to the custody of the marshal, in default of \$5,000 bail, to await the action of the grand jury. By consent, Horner was then discharged, on his own recognizance, until a day named, for the purpose of giving bail, and was subsequently discharged on bail, to await trial.

On the 17th of November, 1891, Horner was surrendered by his surety, and was committed by the commissioner, in default of \$5,000 bail, to the custody of the marshal on the

warrant, to await the action of the grand jury. On the same day, on the petition of Horner, presented to the circuit court of the United States for the southern district of New York, an order was made by that court that writs of *habeas corpus* and *certiorari* issue to the marshal and the commissioner, returnable on that day. Returns were made to the writs, and on the same day, after counsel were heard, the court, held by Judge Wheeler, made an order dismissing the writ of *habeas corpus* and remanding Horner to the custody of the marshal. Horner thereupon took an appeal to this court, on November 17, 1891, and was discharged on bail to abide the further action of the circuit court on the mandate of this court. The complaint in this case is founded on Section 3894 of the Revised Statutes of the United States, as amended by the Act of September 19, 1890, c. 908 (26 Stat. 465), which reads as follows: * * *

There are nine assignments of error in this case, six of which allege that the facts proved before the commissioner do not constitute a crime within Section 3894, as amended; two of them are based on the claim that that section is unconstitutional; and the remaining one contends that that section is in violation of a treaty between the United States and Austria, and is therefore void.

It is contended on the part of the United States that, as the appeal in this case was taken on November 17, 1891, after the act entitled "an act to established circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," c. 517, passed March 3, 1891 (26 Stat. 826), went into effect, this court has no jurisdiction of this appeal, and that it ought to have been taken to the circuit court of appeals for the second circuit. But, as the constitutionality of Section 3894, as amended, is drawn in question, an appeal in this case lies directly to this court from the circuit court, under Section 5 of the Act of March 3, 1891, which gives such appeal "in any case in which the constitutionality of any law of the United States * * * is drawn in question." This is in accordance with our decision in *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, where it was said: "As this case involves the constitutionality of a law of the United States, it is within the appellate

jurisdiction of this court, notwithstanding the appeal was taken since the act establishing circuit courts of appeals took effect. Act of March 3, 1891, c. 517, Section 5; 26 Stat. 827, 828, 1115."

We are further of opinion that where an appeal or writ of error is taken direct to this court under Section 5 of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that, under Section 5, where an appeal or writ of error is taken direct to this court, in a case in which the jurisdiction of the district court or of the circuit court is in issue, it is specifically directed that "the question of jurisdiction alone shall be certified to the supreme court from the court below for decision," but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by Section 5.

See, also, *Burton v. United States*, 196 U. S. 283, and *Williamson v. United States*, 207 U. S. 425, where a United States senator was tried for crime during his term of office: the court held that the question of senatorial privilege accorded by the constitution was a constitutional one and might be carried directly on error from the district court to the supreme court.

ROBINSON v. CALDWELL.

Reported in 165 U. S. 359.
(1897.)

MR. JUSTICE HARLAN delivered the opinion of the court: This suit was brought on the 20th day of October, 1893, by Caldwell against Robinson in the district court of the second judicial district of the state of Idaho.

It appears from the complaint that the plaintiff claimed to be the owner of a certain tract of land in Idaho, containing six hundred and forty acres, and that the validity of his title depended partly, if not altogether, upon the construction of a treaty made between the government of the United States and the Nez Perce Indians on the 11th day of June, 1855. 12

Stat. 957. It also appears that there was drawn in question in the circuit court the constitutionality of the Act of Congress of March 3, 1873, c. 324, 17 Stat. 627.

A temporary injunction was issued in the cause, enjoining the defendant and his servants, counsel and agents, and all others acting in his behalf, from interfering or intermeddling with the plaintiff in the control and peaceable possession of the lands and premises described in the complaint.

Upon a petition subsequently filed in the state court by the defendant, the cause was removed into the circuit court of the United States for the district of Idaho, northern division. By stipulation of the parties the case was transferred to the central division of that court.

The case was heard in the circuit court of the United States upon a motion to dissolve the injunction, and also, pursuant to a stipulation of the parties, upon the merits. A final decree was rendered adjudging the plaintiff to be the true and lawful owner of an undivided one-half interest in the land described in the complaint, and that his title be quieted against the claims, demands and pretensions of the defendant, whom the decree perpetually estopped from setting up any claim to said land or to any part thereof, as described in the decree. 59 Fed. Rep. 653. From this decree the defendant asked and was allowed an appeal to this court. The citation on this appeal was served July 21, 1894.

It is conceded that the appellant also prosecuted an appeal to the circuit court of appeals, which determined the case February 4, 1895, in favor of the plaintiff—the opinion of that court being delivered by Judge Gilbert. 29 U. S. App. 468.

The opinion of Judge Beatty in the circuit court and of Judge Gilbert in the circuit court of appeals both show that the respective courts considered all the questions in the case requiring a construction of the Treaty of 1855, and involving the validity of the Act of March 3, 1873.

The case was not brought to this court from the circuit court of appeals upon *certiorari*, but is here upon appeal directly from the final decree in the circuit court of the United

States. * * * (Court here discusses authorities and proceeds:)

As the construction of a treaty made under the authority of the United States and the constitutionality of an act of congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit court, and determined those questions; and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. 26 Stat. 826, c. 517, Section 5. But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon its merits.

It was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court, and as the defendant chose not to await the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.

We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon *certiorari*. *Appeal dismissed.*

CORNELL v. GREEN.

Reported in 163 U. S. 75.

(1896.)

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court: No question of the jurisdiction of the circuit court has been certified to this court; and the appellate jurisdiction of this court is sought to be maintained upon the single ground that the case "involves the construction or application of the constitution of the United States," with-

in the meaning of the Judiciary Act of March 3, 1891, c. 517, Section 5. 26 Stat. 828.

But, in order to bring a case within this clause of the act, the circuit court must have construed the constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.

The case at bar, as shown by the record, was simply this: Gage made two mortgages of land, conveyed the equity of redemption to Tucker, and died, leaving a widow and minor children, and a will appointing his widow, Tucker and a third person his executors, and devising all his real estate to them. The mortgages were foreclosed, pursuant to decree *pro confesso*, upon a bill in equity, which stated the above facts, and in which Tucker was named as a defendant, as executor of Gage, and as guardian of his minor children, but not in his individual capacity, and was described in the same way in the subpoena. Cornell, claiming title by deed from Tucker's heirs, brought the present bill to redeem the land from the mortgages, and to set aside the proceedings for foreclosure; and therein alleged that Tucker owned the land at the time of all those proceedings, and until his death, and was not made a party to those proceedings, nor subject to the orders of the court therein, and that the decree of foreclosure was of no binding force or effect upon Tucker, or upon his heirs, or upon Cornell as their grantee.

The circuit court, upon general demurrer, dismissed this bill for want of equity, holding that in the former suit Tucker was sufficiently made a party to bind him by the decree in his individual, as well as in his representative capacity. 43 Fed. Rep. 105.

The constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The

first indication of anything like an intention on the part of the plaintiff to invoke the protection of the constitution of the United States is in the suggestion, in the assignment of errors, "that said finding deprived said complainant of his property without due process of law."

The case is governed in every respect by recent decisions construing the same clause of the act of congress.

In a case decided at this term, it was said by the chief justice, in delivering judgment: "A case may be said to involve the construction or application of the constitution of the United States, when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the Act of March 3, 1891." *Ansbro v. United States*, 159 U. S. 695, 697, 698.

In support of that judgment, several cases were cited, two of them very like the case at bar. *Carey v. Houston & Texas Railway*, 150 U. S. 170, 181; *In re Lennon*, 150 U. S. 393, 401. *Appeal dismissed for want of jurisdiction.*

LOEB v. COLUMBIA TOWNSHIP TRUSTEES.

Reported in 179 U. S. 472.
(1900.)

MR. JUSTICE HARLAN delivered the opinion of the court: This action was brought in the court below by Loeb, a citizen of Indiana, against the trustees of Columbia township in Hamilton county, Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the township. After argument the demurrer was sustained

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and, the plaintiff electing not to plead further, judgment was rendered for the defendant.

The suit is upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits.

The questions to be considered relate to the jurisdiction of the court, the validity under the constitution of the United States of an act of the general assembly of Ohio in virtue of which the bonds in suit were issued, and the applicability in this case of certain decisions of the supreme court of the state rendered after such bonds were executed and delivered. * * *

The record contains in full the opinion rendered and filed by the court when disposing of the demurrer. 91 Fed. Rep. 37. In that opinion it is expressly stated that the following points were made in argument in support of the demurrer:

1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action, because the bonds were payable to bearer, and were not made by a corporation.

2. That act of the general assembly, under and by virtue of which the bonds were issued, was in violation of the constitution of the state, and therefore the bonds were invalid.

3. That the act contravened the provisions of the constitution of the United States, and therefore the bonds were invalid.

It appears from the opinion of the circuit court that the first and second of these points were ruled in favor of the plaintiff. But the third point was decided for the defendant, the court being of opinion that according to the principles laid down in *Norwood v. Baker*, 172 U. S. 269, the law under which the bonds sued on were issued was repugnant to that clause of the fourteenth amendment of the constitution of the United States forbidding a state to deprive any person of property without due process of law. In disposing of the third point the court referred to the propositions made in its support as having been "claimed" by township.

1. The first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the circuit court.

By the fifth section of the Circuit Court of Appeals Act of March 3, 1891, appeals or writs of error may be prosecuted to this court from the circuit court "in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." 26 Stat. 826, 827-8, c. 517.

The petition shows that the parties are citizens of different states. It states no other ground of federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court.

Is not this court, however, sufficiently informed by the record that the defendant township, under its general demurrer, "claimed" in the circuit court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the constitution of the United States?

It is said that even if the record shows such a claim to have been made it will not avail the plaintiff; for, it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a state law to the constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to "any case" of the kind specified in the fifth section. And the statute does not in terms exclude a case in which the federal question therein was raised by the defendant. That section differs from Section 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a state in this, that under the latter section we can review the final judgment of the state court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed by him under the constitution or laws of the United States; whereas the Circuit Court of Appeals Act does not declare that the final

judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

It was the purpose of congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state law is in contravention of the constitution of the United States. If the circuit court had adjudged in this case that the township's claim of unconstitutionality was without merit and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the circuit court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the state law upon which his action depended was, upon his adversary's claim, stricken down as void under the constitution of the United States? Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff? The answer to these questions has already been indicated.

It is true that the plaintiff might have carried this case to the circuit court of appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court; for, as said in *Robinson v. Caldwell*, 165 U. S. 359, 362, "it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally deter-

mined upon its merits both in this court and in the circuit court of appeals," although the latter court, before disposing of a case which might have been brought here directly from the circuit court, may certify to this court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the circuit court of appeals, and thereby cut himself off from the right to have this court declare whether the circuit court erred in holding that the state law upon which he relied for judgment was repugnant to the constitution of the United States.

Cases in this court are cited which hold that where the plaintiff invokes the jurisdiction of the circuit court solely upon the ground of diverse citizenship, and where the claim of the invalidity of a state statute under the constitution of the United States came from the defendant or arose after the filing of the petition or during the progress of the suit, then the judgment of the circuit court of appeals is final within the meaning of the sixth section of the Act of 1891, 26 Stat. 826, 828, c. 517, declaring that "the judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." *Colorado Central Consolidation Mining Co. v. Turck*, 150 U. S. 138; *Borgmeyer v Idler*, 159 U. S. 408, 414; *Ex parte Jones*, 164 U. S. 691, 693.

When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the fifth section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a

state law was repugnant to the constitution of the United States. In the present case the circuit court, upon the claim of one of the parties, applied the constitution to the case, and put the plaintiff out of court. *Cornell v. Green*, 163 U. S. 75. Any other interpretation of the statute is inconsistent with the equal right of the plaintiff with the defendant to come here, if unsuccessful, in a case embraced by the fifth section. Here the plaintiff could not have raised in his petition any question of a federal right. He sued on the bonds held by him, and sought only a judgment for money. His cause of action was not federal in its nature. He therefore could not have invoked the jurisdiction of the circuit court upon any ground except that of diverse citizenship. He could not have added to or enforced jurisdiction by anticipating the defense and alleging in his petition that the defendant township would in its answer claim that the state statute in question was in contravention of the constitution of the United States; for that would have been matter of defense, and the allegation could, on motion, have been properly stricken from the petition. Nevertheless, the case is one in which there was a claim that a state law was repugnant to the constitution of the United States.

The views expressed by us as to the scope of the Act of 1891 are supported by *Holder v. Aultman*, 169 U. S. 81, 88. That was an action in the circuit court of the United States for the eastern district of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: "The circuit court, in giving judgment for the plaintiff, held that the contract was made in the state of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that state under the contract, was in conflict with the constitution of the United States authorizing congress to regulate interstate commerce. 68 Fed. Rep. 467. This was therefore a 'case in which the constitution or law of a state is claimed

to be in contravention of the constitution of the United States,' and was rightly brought directly to this court by writ of error under the Act of March 3, 1891, c. 517, Section 5, 26 Stat. 828. Upon such writ of error, differing in those respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co. v. Austin*, 168 U. S. 685."

This brings us to the inquiry whether it can be assumed from the present record that a claim was made in the circuit court that the statute of the state under the authority of which the bonds in suit were issued was invalid under the constitution of the United States. There can be but one answer to this question, if we may look to the opinion filed by the circuit court when it disposed of the demurrer. Although the demurrer was general in its nature, it referred to the petition and its allegations, and thus brought to the attention of the court the state enactment under which the bonds were issued; and it was certainly competent for the township to claim at the hearing of the demurrer that such enactment upon its face was repugnant to the constitution of the United States and therefore void. Turning to the opinion of the circuit court, made part of the transcript, we find it expressly stated therein not only that such a claim was made by the township on the hearing of the demurrer, but that the judgment sustaining the demurrer and dismissing the petition was placed upon the sole ground that the claim that the state law contravened the constitution of the United States was well made.

Is the opinion of the circuit court of no value to us when considering this case? May we not look to it for the purpose of ascertaining whether it was claimed that the state law contravened the constitution of the United States?

* * * (The court discusses many authorities on this point and proceeds:)

* * * It has long been the practice of this court in cases coming from a state court to refer to its opinion made part of the record for the purpose of ascertaining whether any federal right, specially set up or claimed, had been denied to the plaintiff in error, or whether the judgment rested upon any ground of local law sufficient to dispose of the case without reference to any question of a federal character. And we have done this without stopping to inquire whether there was any statute of the state requiring the opinion of the court to be filed in the case as part of the record.

For the reasons we have given it must be held that in a case brought here from a circuit court the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the constitution of the United States. By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.

The result is that this court has jurisdiction to review the judgment of the circuit court, and to determine every question properly arising in the case. We may therefore determine whether the court below erred in sustaining the demurrer to the petition.

LOUISVILLE TRUST COMPANY v. KNOTT.

Reported in 191 U. S. 225.
(1903.)

THIS case arises out of the conflicting claims by the circuit court of the United States for the western district of Kentucky, and the circuit court of Jefferson county, Kentucky, chancery branch, as to the right to administer the property and affairs of the Evening Post Company, a corporation of Kentucky.

The federal court having possession, by its receiver, of the property of that company, declined to surrender possession

to the Louisville Trust Company, the receiver appointed by the state court. From the final order dismissing the intervening petition of the latter company, the present appeal was prosecuted. That order stated: "This appeal is granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this court, or the said Jefferson circuit court, chancery branch, first division, has prior jurisdiction in [is] the single question upon which this cause is decided as to the said Louisville Trust Company; this court holding that its jurisdiction over the said trust estate of the Evening Post Company is prior and exclusive of the said Jefferson circuit court, chancery branch, first division, all of which is hereby certified on the appeal of the said Louisville Trust Company as receiver, etc., to the supreme court of the United States for review as required by law." * * *

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court: We are of opinion that the judgment of the circuit court dismissing the intervening petition of the Louisville Trust Company is not subject to review here upon direct appeal or writ of error to that court.

By the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a circuit court to this court in certain specified cases, among which is "any case in which the jurisdiction of the court is in issue;" and "in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Section 5. In all cases, other than those specified in Section 5 of that act, the circuit court of appeals is given appellate jurisdiction. Section 6.

The question presented by the certificate of the circuit court is not one of jurisdiction, within the meaning of the fifth section of the Act of 1891, and the jurisdiction of that court was not "in issue." There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott, as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the circuit court, as a federal court, to take cognizance of it. The issue made by the

intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, as a federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the circuit court did in that respect was questioned by the Trust Company, on behalf of the state court, solely upon the ground that the taking by the federal court of possession of the property and assets of the Post Company—after the state court by the institution of the Halderman suit had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of federal or state origin, that “where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court;” that, as the object of the suit in the state court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the federal court, whereby the state court was prevented from giving any effectual relief to the parties before it, was inconsistent with the relations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject-matter. *Peck v. Jenness*, 7 How. 612, 624; *Taylor v. Carryl*, 20 How. 583, 596.

In all this there was nothing involving the jurisdiction of the circuit court as a federal tribunal, whose jurisdiction is regulated by acts of congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other. * * *

In principle, the judgment in *Smith v. McKay*, 161 U. S. 355, 358, embraces the present case. The issue presented by the intervening petition did not raise any question under the constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject-matter. We

repeat that the jurisdiction of the circuit court was not and is not questioned for want of power in that court, as a federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that congress intended that any such question should be the basis of a direct appeal to this court from a circuit court.

The question again arose in *Blythe v. Hinckley*, 173 U. S. 501, 506, where this court said: "Appeals or writs of error may be taken directly from the circuit courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as federal courts, the question alone of jurisdiction being certified to this court. The circuit court held that the remedy was at law and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States. *Smith v. McKay*, 161 U. S. 355; *Blythe Co. v. Blythe*, 172 U. S. 644. The circuit court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the circuit court was a federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts. If we were to take jurisdiction on this certificate, we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal can not be maintained in that aspect."

It is proper to observe that this court in *Shields v. Coleman*, 157 U. S. 168, 177, assumed jurisdiction upon direct appeal from a circuit court in a case involving the question whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a state court. As the federal court had, in that case, taken property out of the physical possession of a receiver of the state court, this court expressed its views upon the

question whether the possession of the state court should have been disturbed by the federal court, and it rendered judgment accordingly. But the precise question here presented as to the jurisdiction of this court under the Act of 1891, on direct appeal from the circuit court, was not there raised or considered. In *United States v. Moore*, 3 Cr. 159, 172 (1805), it was held that this court was without jurisdiction, under the law as it then was, to review the final judgment of the circuit court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice Marshall met that suggestion by saying: "No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." To the same effect, substantially, are *United States v. Sanges*, 144 U. S. 310, 319, and *Cross v. Burke*, 146 U. S. 82.

In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891.

For the reasons stated, the appeal from the circuit court must be dismissed for want of jurisdiction in this court. *It is so ordered.*

That the certificate of the question of jurisdiction does not raise the matter of the authority of the district court as a judicial tribunal in general, but as a *federal* judicial tribunal, see *Smith v. McKay*, 161 U. S. 355; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, and *Phillips Co. v. Grand Trunk W. Ry.*, 195 Fed. 12.

UNION TRUST COMPANY v. WESTHUS.

Reported in 228 U. S. 519.

(1913.)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court: Plaintiff in error was plaintiff below, and brought this action to recover a sum levied as a legacy tax under Sections 29 and 30 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 464, 465, as amended by the Act of March 2, 1901, c. 806, Sections 10, 11, 31 Stat. 938, 946-948. The grounds for recov-

ery stated in the petition in effect presented only questions of statutory construction. The trial court, being of opinion that a recovery was justified upon one of the stated grounds, sustained a demurrer to the answer, and, the defendants not desiring to plead further, judgment was entered for the plaintiff. The case was then taken to the circuit court of appeals. That court in a full and careful opinion reviewed the grounds for recovery relied upon in the petition, decided that all the grounds of the claim were without merit and held there was no right to the relief prayed. In consequence the judgment of the court below was reversed and the case was remanded with directions to overrule the demurrer, and for further proceedings consistent with the views expressed in the opinion of the court. 164 Fed. Rep. 795. A petition for rehearing was overruled. 168 Fed. Rep. 617.

On the receipt of the mandate the trial court allowed the plaintiff to file an amended petition, wherein, in addition to repeating the contentions urged in the original petition it was alleged that the "clear value" of the life estate in question had been fixed and determined by a method so arbitrary as to amount to a deprivation of property without due process of law. A demurrer to this amended petition was sustained, and, the plaintiff electing not to plead further, judgment was entered in favor of the defendants.

The case was then brought directly to this court upon the theory that a constitutional question was involved. The assignments of error invoked a re-examination of all the issues including those which had been adversely passed on by the circuit court of appeals. On these assignments the case was argued at bar and taken under advisement on a record which contained only the proceedings had in the trial court subsequent to the filing of the mandate of the circuit court of appeals. While in that situation the published report of the opinion of the circuit court of appeals came under our observation. Mindful of the proper consideration due to the circuit court of appeals and of our duty at all times to be scrupulous to keep within our jurisdiction, for the purpose of enabling us to apply the doctrine announced in the case of *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, in

which case, as in this, the record did not disclose that the cause had been passed upon by the circuit court of appeals, although there was on the files of this court *certiorari* proceedings so showing, to which resort was had, we directed that the court below supply the deficiency, if any there was, in the record, by certifying all the proceedings had in the case. At once, by stipulation of counsel, an additional transcript was filed stating the proceedings on the first trial, the taking of the appeal to the circuit court of appeals and the action of that court, and in the light thus afforded we come first to consider our jurisdiction over the controversy.

There can be no doubt that on the record upon which the circuit court of appeals acted the judgment of that court, if it had been final in form, would have been beyond our competency to review. *Spreckels Sugar Refining Co. v. McClain*. 192 U. S. 397. There can equally be no doubt that if we have power to pass upon the case on this record, our jurisdiction embraces not only the right to decide the alleged constitutional question raised after the mandate of the circuit court of appeals had been filed in the trial court, but also all other questions arising on the record including those passed upon by the circuit court of appeals. Indeed, it is unnecessary to cite the many authorities sustaining this view, since the insistence of the plaintiff in error is that every question is open, and in effect the argument seeks a review and reversal of the rulings previously made by the circuit court of appeals. But by the distribution of power made by the Act of 1891 and embodied in the Judicial Code, no jurisdiction is conferred upon this court to review a judgment or decree of the circuit court of appeals otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed. Under these conditions the absence of jurisdiction to exercise the authority which we are now asked to exert would seem to be clear unless the principle be recognized that we have a right to do by indirection that which the statute gives us power only to do by direct action. It is, however, said the statute gives the right to come directly to this court where a constitutional question is involved and as such question was raised below, albeit after the case was pend-

ing in the trial court for the purpose of giving effect to the mandate of the circuit court of appeals, the right to direct review exists and can not be denied without refusing to accord the relief plainly afforded by the statute. At best this proposition but involves the assertion that by virtue of the power conferred to take a direct appeal from one court, authority is given to indirectly review the decision of another and higher court, although the statute restricts the right to review such decision to a direct proceeding. But resort to original reasoning to establish the unsoundness of the proposition relied on is scarcely necessary, as that result will be made plainly manifest by applying principles established in the following cases: *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 37; *Brown v. Alton Water Co.*, 222 U. S. 325, and *Metropolitan Co. v. Kaw Valley District*, 223 U. S. 519. Nor, as in effect held in the Metropolitan case, can the case of *Globe Newspaper Co. v. Walker*, 210 U. S. 356, be considered as announcing a doctrine in conflict with the rulings in the Aspen and Alton cases. And aside from a distinction suggested in the Metropolitan case between the Aspen and Alton cases and the Globe case, it must follow that if the ruling in the Globe case was in anywise in conflict with the doctrine announced and approved in the Metropolitan case, to the extent of such conflict it was necessarily qualified by that decision.

It is insisted, however, that in both the Aspen and the Alton cases, the questions which it was sought to review by direct appeal after the decision of the circuit court of appeals, had been, either expressly or by necessary implication, passed upon by that court and therefore were expressly foreclosed, while here such is not the case, since the constitutional question was not in the case when it went to the circuit court of appeals, but only made its appearance by an amendment to the pleadings after the decision of that court. Granting the premise upon which the argument rests, the deduction is unfounded. The ruling in both the Aspen and Alton cases rested upon the plain ground of the duty of this court not to exert a power not conferred, of the impossibility of proceeding upon the theory that error could be said to have been committed by the trial court because it had applied the decisions of the circuit

court of appeals or of maintaining the right to the direct appeal which was relied upon in those cases consistently with the power of the circuit court of appeals, not only to decide questions within its jurisdiction, but moreover to determine whether, when in a particular case it had decided such questions and remanded the case in which they had been decided to a trial court for further proceedings that court had in such further proceedings given due effect to its decision. Indeed these considerations were expounded in the Metropolitan case, and it was there pointed out that the attempt to make a distinction upon the mere form of the mandate was without merit (p. 523). Looked at *arguendo*, however, as a matter of first impression, the source of the error which the proposition here relied upon involves is not difficult to perceive. It consists in pursuing a mistaken avenue of approach to this court; that is, of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the circuit court of appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here. The error comes from attempting, after the case has been taken to the circuit court of appeals and been there decided, to resort to proceedings for review which under the statute are applicable only in case no such action by the circuit court of appeals had been taken. A consideration of the confusion which inevitably would result if the doctrine of the Metropolitan, Alton and Aspen cases were not applied, of the necessity which would arise for denying powers conferred upon the circuit court of appeals by the statute and of calling into play a power of review by this court not given, clearly demonstrates the error of the right to direct appeal here insisted upon. And the correctness of the rule announced in the Aspen case and which was reiterated in the Alton and Metropolitan cases, which we again now apply, is shown by the complete concordance between all of the provisions of the statute which will be brought about by its application. *Dismissal for want of jurisdiction.*

ACCORD:

No review by error from supreme court to direct district court when the latter court has carried out a mandate of the circuit court of appeals

upon error there from the district court, although new constitutional questions have since arisen in district court. *Shapiro v. United States*, 235 U. S. 412.

Presumption that court below considered treaties in reaching decision on second trial. *McGovern v. Railway*, 235 U. S. 389.

Each party may appeal directly from circuit court to supreme court on question of constitutionality, regardless of allegations of diversity of citizenship in the bill of complaint. *Field v. Barber Asphalt Company*, 194 U. S. 618; but see this case distinguished in *Mississippi R. R. Commission v. I. C. Ry.*, 203 U. S. 335.

In *Altman v. United States*, 224 U. S. 583, there was an appeal directly from order of circuit court of United States, affirming a decision of board of general appraisers sustaining an assessment of duty by the collector upon a bronze bust imported. Involved were tariff Act of 1897 and commercial agreement with France negotiated in pursuance of Section 3 of tariff Act of 1897.

Here direct appeal is permissible on account of the treaty provisions involved. If merely a question arises under the revenue acts, it is settled finally in circuit court of appeals, and there is no appeal to supreme court of United States.

In *Brolan v. United States*, 236 U. S. 216, the court held that a contention of unconstitutionality of a statute involved was frivolous, since the court had previously upheld the statute in question.

BILLINGS v. UNITED STATES.

Reported in 232 U. S. 261.

(1914.)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court: It is necessary to determine whether these two cases from different courts are not virtually one and to be considered in that aspect.

The United States sued for the amount of a tax with interest. The alleged liability under the statute was challenged and if it existed the statute was alleged to be repugnant to the constitution of the United States and right to interest was denied. The court held the statute to be constitutional and judgment was awarded for the sum claimed, but the prayer for interest was rejected. Error was prosecuted directly from this court by the defendant and from the circuit court of appeals by the United States, the first because of the constitutional questions and the second because of the disallowance of interest. The circuit court of appeals certified a question concerning the right to recover interest, and the two cases before us

consist of the direct writ of error on the one hand and the certificate on the other. Both writs of error when taken were authorized. *Ohio R. R. Comm. v. Worthington*, 225 U. S. 101; *Macfadden v. United States*, 213 U. S. 288. Our jurisdiction, however, on the direct writ of error is not confined to the constitutional questions, but embraces every issue in the case. *Williamson v. United States*, 207 U. S. 425. The circuit court of appeals, however, has no power to ask instructions upon an issue which it has no right to decide and we have no authority to instruct on such a subject or to refuse to decide issues which are properly before us for judgment.

Under these conditions, we think the better practice is, as regards the controversy as to interest which was taken to the circuit court of appeals by writ of error and in which cases the certificates now before us were drawn, to treat the writ of error from the circuit court of appeals as in substance pending here on a cross-writ by the United States, and as without further orders the record is in such a condition as to enable us to decide the whole case, we proceed to do so. * * *

See *West v. Brashear*, 14 Pet. 51, for illustration of a mandate of the supreme court and a discussion of its effects.

(b) From circuit court of appeals. (See above, under cases made final and cases not made final, pages 602 to 641.)

OUTLINE OF APPELLATE JURISDICTION OF THE FEDERAL COURTS.

A. Supreme court.

I. From district court.

1. Exclusive

where jurisdiction rests *only* on the ground of

- a. Being a case of prize,
- b. Being a case involving the construction or application of the federal constitution.
- c. Being a case involving constitutionality of a federal law or the construction or validity of a treaty.
- d. Being a case in which the constitution or law of a state is claimed to be in contravention of the federal constitution.

A. Supreme court—*Continued.*I. From district court—*Continued.*

2. Not exclusive.

- a. Where jurisdiction is based on diversity of citizenship and questions a, b, c, or d above arise during the litigation, the case may be taken to the supreme court or to the circuit court of appeals, but can not as matter of right be taken from the latter to the supreme court.
 - b. Where jurisdiction is based, both on diversity of citizenship and a federal question, the case may be taken either to the supreme court or the circuit court of appeals, and if to the latter it may thence as matter of right be taken to the supreme court.
3. The question whether the district court has jurisdiction may *alone* be certified to the supreme court.
 4. In all cases taken directly to the supreme court, except where the question of jurisdiction alone is certified, the supreme court determines the whole case.

II. From circuit court of appeals.

1. By appeal or writ of error.

- a. In cases not made final involving more than \$1,000.
- b. Where jurisdiction is in the bill of complaint based on diversity of citizenship and a federal question.

2. By certification of a question of law.

3. By ordering up whole record where a question of law has been certified.

4. By writ of *certiorari* in a case made final.

References: See especially *Huguley Mfg. Co. v. Galeton Mills*, 184 U. S. 290; *Field v. Barber Asphalt Company*, 194 U. S. 618; *Miss. R. R. Com. v. I. C. Ry.*, 203 U. S. 335.

B. Circuit court of appeals.

1. Cases made *final* therein.
2. Cases where jurisdiction of district court is based *only* on diversity, and during litigation questions under a, b, c, or d (above 1) enter, may go to supreme court or circuit court of appeals.
3. Cases like 2, but federal questions other than those under a, b, c, or d enter, must go to circuit court of appeals.
4. Cases where question of jurisdiction is raised and district court claims jurisdiction and proceeds to judgment, may be taken to circuit court of appeals which may in its discretion certify question of jurisdiction over to supreme court.

C. To both circuit court of appeals and supreme court.

- a. To supreme court on question of jurisdiction and circuit court of appeals on other questions, latter suspending action until supreme court decides, but supreme court will not entertain question of jurisdiction if case first taken to circuit court of appeals.

References: *Columbus Construction Company v. Crane Company*, 174 U. S. 600; *Pullman's Palace Car Co. v. Transportation Co.*, 171 U. S. 138; and *McLish v. Roff*, 141 U. S. 661, 667.

(c) From state court.**COHENS v. VIRGINIA.**

Reported in 6 Wheaton, 264.
(March 3, 1821.)

MARSHALL, Chief Justice, delivered the opinion of the court: This is a writ of error to a judgment rendered in the court of Hustings for the borough of Norfolk, on an information for

This jurisdiction is conferred by the Act of September 24, 1789, 1 Stat. L. 73, Section 25, which remained unaltered until the Act of February 5, 1867, embodied with no substantial change in R. S. U. S., Section 709, which was considered at great length and construed in *Murdock v. City of Memphis*, 20 Wall. 590, and compared with the Act of 1789, the court (Justice Miller) laying down certain propositions as principles to guide in the construction and application of the statute to a given case (*Id.*, pp. 635, 636), namely:

selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protec-

1. That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the state court.

2. That it must have been decided by the state court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws, or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered, or remand the case to that court, as the circumstances of the case may require.

These principles have been appealed to in a multitude of cases since arising.

This case deserves to be studied, along with *Martin v. Hunter* and *Cohens v. Virginia*, *supra*, to complete the discussion of the power of the supreme court to review decisions of the state courts.

Subsequent changes in the statute, all of minor significance, are found in 18 Stat. L. 318, Act of February 18, 1875, Chapter 80, and as there changed it is entirely included in the Act of March 3, 1911, 36 Stat. L. 1156, Chapter 231; the supreme court is authorized by the amendment of December 23, 1914, 38 Stat. L. 790, Chapter 2, to issue a writ of *certiorari* to the state court in a case where the federal question was decided against the state authority, etc., or in favor of the federal authority, etc., to have the same effect as if the case had been taken to the supreme court on error or appeal.

tion of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If upon this case, the court shall be of opinion, that the acts of congress before mentioned were valid, and on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion, that the statute or act of the general assembly, of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs." Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the state in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction. In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are—1st. That a state is a defendant. 2d. That no writ of error lies from this court to a state court. 3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said, that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is, to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining, peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the Union. That the constitution, laws and treaties may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision, without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state. The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described.

without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," and "between a state and foreign states, citizens or subjects." If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated, that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article. A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the twenty-fifth section of the Judiciary Act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under

the laws of the United States, it follows, that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be apparent as to overrule the words which its framers have employed. The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent state is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question, whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear, that the state has submitted to be sued, then it has parted with this sovereign right of judging, in every case, on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience, that this union can not exist, without a government for the whole; and they have been taught by the same experience, that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.

If it could be doubted, whether, from its nature, it were not supreme, in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to

the contrary notwithstanding.” This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government, ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given “in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty, to themselves and their posterity.” With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution

and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed, by the enumeration of those cases to which the jurisdiction of the federal courts is extended, in consequence of the character of the parties. In that enumeration, we find "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects." One of the express objects, then, for which the judicial department was established, is the decision of controversies between states, and between a state and individuals. The mere circumstance, that a state is a party, gives jurisdiction to the court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state, a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which

the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it, as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the principle, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution, which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed, by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union can not correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole. The answer which has been given to this argument, does not deny its truth, but insists, that confidence is reposed, and may be safely reposed, in the state institutions; and that, if they shall

ever become so insane, or so wicked, as to seek the destruction of the government, they may accomplish their object, by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant, in the declaration, that the cases which have been put, of direct legislative resistance, for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; but we can not help believing, that a general conviction of the total incapacity of the government to protect itself and its laws, in such cases, would contribute in no inconsiderable degree to their occurrence. Let it be admitted, that the cases which have been put, are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the constitutional powers of congress. We know, that at one time, the assumption of the debts contracted by the several states, during the war of our revolution, was deemed unconstitutional, by some of them. We know, too, that at other times, certain taxes, imposed by congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much, to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states, the judges are dependent for office and for salary, on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose, that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress.

These prosecutions may take place, even without a legislative act. A person making a seizure under an act of congress, may be indicted as a trespasser, if force has been employed, and of this, a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final!

These collisions may take place, in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course can not always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was framed—nothing in the history of the times—which would justify the opinion, that the confidence reposed in the states was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of congress, under the confederation, were as constitutionally obligatory, as the laws enacted by the present congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable, that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation, from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of a new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumen-

talities of state governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual, without the aid of any other power; why may they not protect him from punishment, for performing his duty in executing them?

The counsel for Virginia endeavor to obviate the force of these arguments, by saying that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, can not arise, until there shall be a disposition so hostile to the present political system, as to produce a determination to destroy it; and when that determination shall be produced, its effects will not be restrained by parchment stipulations; the fate of the constitution will not then depend on judicial decisions. But should no appeal be made to force, the states can put an end to the government by refusing to act; they have only not to elect senators, and it expires without a struggle. It is very true, that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it, is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation, acting in opposition to the general will.

It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of per-

forming all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction; and conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think, they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality, in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore, the judicial power is not extended to the last. This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force, if urged to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force, when urged to prove that this court can not inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given, where the parties have not an original right to come into court, that part of the second section of the third article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction, where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not

apprehended, and therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was, the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such, as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and can not be exercised in the appellate form. The words of the constitution are, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction." This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the supreme court original jurisdiction, in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised, in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are

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to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution—the character of the parties is everything, the nature of the case nothing. In the other description of the cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution—in these, the nature of the case is everything, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class, those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations. That the constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which, of consequence, could not originate in the supreme court; in such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form, is to deny its existence, and would be to construe a clause, dividing the power of the supreme court, in such a manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is

absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made, for the purpose of contending, that the legislative may "apportion the judicial power between the supreme and inferior courts, according to its will." That would be, as was said by this court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This can not, therefore, be the true construction of the article. But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a state is a party, the supreme court shall have original jurisdiction; but does not say, that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that where the case is of such a nature, as to admit of its originating in the supreme court, it ought to originate there; but where, from its nature, it can not originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction can not be exercised, where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the supreme court, but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another

state in a circuit court? Should the circuit court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the supreme court? The argument is, that it could not; and the very clause which is urged to prove, that the circuit court could give no judgment in the case, is also urged to prove, that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction, if they would admit of any other. But without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original, "in cases affecting ambassadors, other public ministers and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws and treaties of the United States." It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court, in that very case, if the suit were to be brought in another court, and that court were to assert juris-

diction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our prize courts, the claims of their fellow-subjects. These suits are maintained by them, as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous, to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted, which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases, in which an original suit might not be instituted in a federal court. Of the last description, is every case between a state and its citizens, and, perhaps,

every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court can not take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court can not be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal courts, in which original jurisdiction can not be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of *Marbury v. Madison*. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction, in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against

this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says, that such a construction would render the cause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to them, or they have no operation at all." "It can not be presumed," adds the court, "that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." The whole reasoning of the court proceeds upon the idea, that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because, otherwise, the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If, in that case, original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which their decision is supported, but in some instances, contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because, otherwise, the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning, in the particular case, to one in which the words have their full operation, when understood affirmatively, and in which the negative or exclusive sense, is to be so used as to defeat some of the great objects of the article. To this construction, the court can not give assent. The general expressions in the case of *Marbury v. Madison* must be understood, with the limitations which are given to

them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument, put several cases, for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court. Were a state to lay a duty on exports, to collect the money, and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state, to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration. The citizen who has paid his money to his state, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money, and it is upon that *assumpsit*, that the action is to be maintained. To refuse to comply with this *assumpsit* may be no more a violation of the constitution, than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case, as to give it a real resemblance to that under consideration. Suppose, a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the constitution, and would be the very case now before the court.

We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us, that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume, that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land, for that which the treaty secures to him, not against the state for money which is not secured to him.

The case of a state which pays off its own debts with paper money, no more resembles this, than do those to which we have already adverted. The courts have no jurisdiction over the contract; they can not enforce it, nor judge of its violation. Let it be, that the act discharging the debt is a mere nullity, and that it is still due. Yet, the federal courts have no cognizance of the case. But suppose, a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose, a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution? If his plea should be overruled, and judgment rendered against him, his case would resemble this; and unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary can not, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We can not pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we can not avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we can not insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated, without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their

construction by circumstances. One of these instances is, the grant by a state of a patent of *nobility*. The court, he says, can not annul this grant. This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a court of justice. If the question can not be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend.

The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the court can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import, ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend. We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws or treaties of the United States, was not arrested by the circumstance that a state was a party.

This leads to a consideration of the eleventh amendment. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state

from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual, in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, and so strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, etc." What is a suit? We understand it to be prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party

injured is deprived.” “The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror, to be ‘the lawful demand of one’s right;’ or, as Bracton and Fleta express it, in the words of Justinian, ‘*jus prosequendi in judicio quod alicui debetur,*’ ” Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the supreme court against some of the states, before this amendment was introduced into congress, and others might be commenced, before it should be adopted by the state legislature, and might be pending at the time of its adoption. The object of the amendment was, not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced, when this article should form a part of the constitution. It, therefore, embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a state by a citizen of another state. If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is, clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state.

A writ of error is defined to be, a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such

examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment, tit. Error, L, it is laid down, "where, by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage or the like, a release of all actions personal, is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real, is a good bar; but where, by a writ of error, the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his reports. A writ of error, then, is in the nature of a suit or action, when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive.

This rule will apply to writs of error from the courts of the United States, as well as to those writs in England. Under the Judiciary Act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it, of any description, is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given, rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically

proper, where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party, that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he can not be brought into court, nor is his failure to appear considered as a default. Judgment can not be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citations, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court, in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet, writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States, into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and therefore, not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into

this court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit, in the sense of the eleventh amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

2. The second objection to the jurisdiction of the court is, that its appellate power can not be exercised, in any case, over the judgment of a state court. This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state; and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it, is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it. This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it.

Let this unreasonableness, this total incompatibility, be examined. That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people.

In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character, they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable, that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable, that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable, as to furnish a justification for controlling the words of the constitution? We think it is not. We think, that in a government, acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in

such cases, or a power to revise the judgment rendered in them, by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws and treaties of the United States; and if a case of this description brought in a state court can not be removed before judgment, nor revised after judgment, then the construction of the constitution, laws and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts) "of final jurisdiction over the same causes, arising upon the same laws, is a *hydra* in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defending the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import. They give to the supreme court appellate jurisdiction, in all cases arising under the constitution, laws and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge, that they were convened for the purpose of strengthening the confederation, by enlarging the powers of the government, and by giving efficacy

to those which it before possessed, but could not exercise. They inform us, themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government. Previous to the adoption of the confederation, congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended. The confederation gave to congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures." This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation, necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation, than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws and treaties of the United States; and in a subsequent clause declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given, which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition.

No question, it is believed, has arisen, to which this principle applies more unequivocally than to that now under considera-

tion. The opinion of the federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the view with which it was framed. These essays having been published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow that the power objected to is given, and defend it. In discussing the extent of the judicial power, the *Federalist* says, "Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution in direct terms gives an appellate jurisdiction to the supreme court, in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded, at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeable to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and

assimilate the principles of natural justice, and the rules of natural decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expression which gives appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the Judiciary Act itself. We know, that in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme court appellate jurisdiction over the judgments of the state courts, in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe, that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts, in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal. This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented, in a great variety of forms, the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the constitution, be in all things totally distinct

and independent of each other. If this court can correct the errors of the courts of Virginia, he says, it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia. But it has been already shown, that neither of these consequences necessarily follows: The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts, which may conflict with the constitution, laws or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still derives its authority from the state, the other still derives its authority from the nation.

If it shall be established, he says, that this court has appellate jurisdiction over the state courts, in all cases enumerated in the 3d article of the constitution, a complete consolidation of the states, so far as respects judicial power is produced. But, certainly, the mind of the gentleman who argued this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument, in all its forms, is essentially the same. It is founded, not on the words of the constitution, but on its spirit—a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands. To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think, the result must be, that there is nothing so extravagantly

absurd, in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves; and on their construction, we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*.

The litigation terminating in *Martin v. Hunter's Lessee*, 1 Wheaton, 304, dealing with this same general question, may be traced through *Hunter v. Fairfax's Devisee*, 1 Munf. 218, 7 Cranch, 603, 4 Munf. 1, and 1 Wheaton, 304.

The opinion of Justice Story, in this case, and the opinion of Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheaton, 264, leave nothing to be said in favor of the jurisdiction of the supreme court, while the strongest opinion *contra* is probably that of Judge Roane in 4 Munf. 1, at pp. 25 to 54.

On the same general question, see *Dodge v. Woolsey*, 18 Howard, 331, discussion by Justice Wayne, on pp. 347 (bottom) to 358 (middle).

Federal question must be suggested or presented in state court to be made the basis of review in supreme court of United States on error. *Olympia Mining Co. v. Kerns*, 236 U. S. 211.

MILLER v. NICHOLS.

Reported in 4 Wheaton, 311.

(1819.)

ERROR to the supreme court of the state of Pennsylvania. The case agreed in the court below, stated, that William Nicholls, collector, etc., being indebted to the United States of America, on the 9th of June, 1798, executed a mortgage to Henry Miller, for the use of the United States, in the sum of \$59,444, conditioned for the payment of \$29,271, payable, \$9,757 on or before the 1st of January, 1799; \$9,757 on or before the 9th of June, 1799; and \$9,757 on or before the 9th of September, 1799. A *scire facias* was issued upon the said mortgage, returnable to September term of the said supreme court of Pennsylvania, in the year 1800, and judgment thereupon entered up, in the said supreme court, on the 6th of March, 1802, and thereupon, a *levari facias* issued, and was levied upon the property of the said William Nicholls, and the same being sold to the highest bidder, for the sum of \$14,530, the same was brought into court,

and is now deposited in the hands of the prothonotary of said court, subject to the orders of the same court. That, on the 22d of December, 1797, the accounts of the said William Nicholls with the commonwealth of Pennsylvania were settled by the comptroller and register-general of the commonwealth. (Prout account and settlement.) That an appeal from said settlement was filed in the office of the prothonotary of the said supreme court, on the 9th day of March, 1798, and judgment thereupon entered in favor of the commonwealth, against the said William Nicholls, in the said supreme court, on the 6th day of September, 1798, for the sum of \$9,987.15.

Upon the preceding statement, the following question is submitted to the consideration of the court: Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December, 1797, was, and is, a lien, from the date thereof, upon the real estate of the said William Nicholls, and which has since been sold as aforesaid?

A. J. Dallas, for the United States; J. B. McKean, for the commonwealth of Pennsylvania.

December 2d. 1803.

The supreme court of Pennsylvania, on the 21st of March, 1805, on motion of Mr. McKean, attorney general of the said commonwealth, made a rule on the plaintiff in error, to show cause why the amount of the debt due to the said commonwealth should not be taken out of court. And on the 22d of March, 1805, Alexander James Dallas, the attorney of the United States for the district of Pennsylvania, came into court and suggested, "that the commonwealth of Pennsylvania ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the suit, because the said attorney, on behalf of the United States, saith, that as well by virtue of the said execution, as of divers acts of congress, and particularly of an act of congress, entitled 'an act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys,' approved the 3d of March, 1797, the said United States are entitled to have and receive the money aforesaid, and not the said commonwealth of Pennsylvania.

"A. J. Dallas."

The record then proceeds as follows: "And now, to wit, this 13th day of September, 1805, the motion of the attorney general, to take the money out of court, was granted by the unanimous opinion of the court." (See 4 Yeates, 251.) The proceedings were afterwards brought before this court by writ of error.

(March 9, 1819.)

Sergeant, for the defendant in error, moved to dismiss the writ of error, in this cause, for want of jurisdiction, under the Judiciary Act of the 24th of September, 1789, Section 25; it nowhere appearing, upon the face of the record, that any question arose respecting the validity of any treaty or statute of the United States, or of any statute of the state, upon the ground of its repugnancy to the constitution or laws of the United States. *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Inglee v. Coolidge*, 2 *Ibid.* 363.

The attorney general, *contra*.

MARSHALL, Chief Justice, delivered the opinion of the court: The question decided in the supreme court for the state of Pennsylvania respected only the construction of a law of that state. It does not appear, from the record, that either the constitutionality of the law of Pennsylvania, or any act of congress was drawn into question.

It would not be required, that the record should, in terms, state a misconstruction of an act of congress or that an act of congress was drawn into question. It would have been sufficient, to give this court jurisdiction of the cause, that the record should show that an act of congress was applicable to the case. That is not shown by this record. The act of congress which is supposed to have been disregarded, and which, probably, was disregarded by the state court, is that which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the supreme court of Pennsylvania. But that fact does not appear. No other question is presented than the correctness of the decision of the state court, according to the laws of Pennsylvania, and that is a question over which this court can take no jurisdiction. The writ of error must be dismissed. *Writ of error dismissed.*

WILSON v. BLACK-BIRD CREEK CO.

Reported in 2 Peters, 245.

(1829.)

ERROR to the high court of errors and appeals of the state of Delaware.

The Black-bird Creek Marsh Company were incorporated by an act of the general assembly of Delaware, passed February, 1822; and the owners and possessors of the marsh, cripple and low grounds in Appoquinimink hundred in New Castle county, and state of Delaware, lying on both sides of Black-bird creek, below Mathews's landing, and extending to the river Delaware, were authorized and empowered to make and construct a good and sufficient dam across said creek, at such place as the managers, or a majority of them, should find to be most suitable for the purpose; and also to bank the said marsh, cripple and low ground, etc. After the passing of this act, the company proceeded to erect and place in the creek a dam, by which the navigation of the creek was obstructed; also embanking the creek, and carrying into execution all the purposes of their incorporation.

The defendants, being the owners, etc., of a sloop called the Sally, of 95 9-95 tons, regularly licensed and enrolled according to the navigation laws of the United States, broke and injured the dam so erected by the company; and thereupon, an action of trespass *vi et armis*, was instituted against them in the supreme court of the state of Delaware, in which damages were claimed amounting to \$20,000. To the declaration filed in the supreme court, the defendants filed three pleas; the first only of which being noticed by the court in their decision, the second and third are omitted. This plea was in the following terms:

1. That the place where the supposed trespass is alleged to have been committed, was, and still is, part and parcel of said Black-bird creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and reflowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway, for all the citizens of the state of Delaware and of the United States, with sloops or other vessels, to navigate, sail, pass and repass, into, over, through, in and upon the same, at all times

of the year, at their own free will and pleasure. Therefore, the said defendants, being citizens of the state of Delaware and of the United States, with the said sloop, sailed in and upon the said creek, in which, etc., as they lawfully might, for the cause aforesaid; and because the said gum piles, etc., bank and dam, in the said declaration mentioned, etc., had been wrongfully erected, and were there wrongfully continued standing, and being in and across said navigable creek, and obstructing the same, so that without pulling up, cutting, breaking and destroying the said gum piles, etc., bank and dam respectively, the said defendants could not pass and repass with the said sloop, into, through, over and along the said navigable creek; and that the defendants, in order to remove the said obstructions, pulled up, cut, broke, etc., as in the said declaration mentioned, doing no unnecessary damage to the said Black-bird Creek Marsh Company; which is the same supposed trespass, etc.

The plaintiff, in the supreme court of the state, demurred generally to all the pleas; and the court sustained the demurrers, and gave judgment in their favor. This judgment was affirmed in the court of appeals, and the record remanded, for the purpose of having the damages assessed by a jury. Final judgment having been entered on the verdict of the jury, it was again carried to the court of appeals, where it was affirmed, and was now brought before this court, by the defendants in that court, for its review.

MARSHALL, Chief Justice, delivered the opinion of the court: The defendants in error deny the jurisdiction of the court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question. Undoubtedly, the plea might have stated in terms, that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt, that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. The plaintiffs sustain their right to build a dam across the creek,

by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly. The plea does not controvert the existence of the act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway. This plea draws nothing into question but the validity of the act, and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to, the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. The court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter's Lessee*, 1 Wheat. 355; *Miller v. Nicholls*, 4 *Ibid.* 311; and *Williams v. Norris*, 12 *Ibid.* 117, are expressly in point. They establish, so far as precedents can establish anything, that it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judiciary Act, if the record show that the constitution, or a law or a treaty of the United States, must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law. * * *

See *Harris v. Dennie*, 3 Peters, 292; *Satterlee v. Matthewson*, 2 Peters, 380, 409, and in *Williams v. Bruffy*, 102 U. S. 248, at p. 252, Justice Field, rendering the opinion of the court says: "We do not understand that the court of appeals intends by its refusal to deny or question the appellate power of this tribunal in cases arising in the state court where the validity of a statute of, or of an authority exercised under, the state is drawn in question, on the ground of its repugnancy to the constitution and laws of the United States, and the decision is in favor of its validity. Its appellate jurisdiction over the judgments of the state courts in such cases, and other cases mentioned in the twenty-fifth section of the Judiciary Act of 1789 (re-enacted in the Revised Statutes), passed beyond the region of discussion in this court more than half a century ago. As early as 1816, in the celebrated case of *Martin v. Hunter's Lessee*, this court, in an opinion of unanswerable reasoning, from the general language of the constitution, asserted its appellate jurisdiction over the

state courts in the cases mentioned in the act. It also showed that the jurisdiction had been sustained in a great variety of cases, and that the doctrine had been acquiesced in by enlightened state courts without a judicial doubt being breathed until that case arose. No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over state courts where the constitution, laws, and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a state law or authority in conflict with them. And in no class of cases could that jurisdiction be more properly invoked than when, by enactments of a revolutionary organization against the government of the United States, the property or the rights of citizens of the loyal states are attempted to be destroyed or impaired because of their loyalty to the Union."

SAYWARD v. DENNY.

Reported in 158 U. S. 180.

(1895.)

MOTION to dismiss. This was an action at law brought by Arthur A. Denny and F. X. Prefontaine, as executors of the last will and testament of James Crawford, deceased, against William P. Sayward, in the superior court of Kitsap county, state of Washington, to recover moneys paid by James Crawford on a contract which he had executed as surety for William P. Sayward as principal. The complaint alleged that the contract referred to was executed by Sayward as principal, by and through his authorized agent, George A. Meigs, and by George A. Meigs, James Crawford, and William Harrington as sureties, and set it forth in *hæc verba*, it being an agreement for the purchase of logs of Dingwall and Haller, to be used in certain lumber mills belonging to Sayward. It was further averred that Crawford and Harrington had no interest in the contract and executed it only as sureties for the accommodation of Sayward; that afterwards Haller commenced an action thereon for the purchase price of the logs, against Crawford, Harrington, Meigs, and Sayward; that Crawford and Harrington appeared in and defended the action, as did Meigs, and such proceedings were had therein that about November 3, 1882, Haller recovered judgment against Crawford, Harrington, and Meigs in the sum of \$15,248.01 with costs; "that said Sayward was never served with process in said action, and never

appeared in said action; that at all the times during the pendency of said action he was outside of the state (then territory) of Washington, and was out of the jurisdiction of said court;'' that Crawford died leaving a last will and testament, in which plaintiffs were named as executors; that the will was duly admitted to probate, and plaintiffs appointed and qualified and entered upon their duties as executors; that thereafter Haller presented his claim to said executors as a judgment creditor, and the executors were compelled to pay, and did pay, out of Crawford's estate for the use of defendant Sayward the sum of \$9,200 to apply, and it was applied, to the payment of the judgment; that Sayward had never repaid said sum of money to Crawford or his estate, or any part thereof, and it remained due with interest; that at the time the judgment was obtained, and at the time the cause of action accrued against Sayward, he was out of and absent from the state of Washington, and at no time since the cause of action accrued, until within a year prior to the commencement of the action, had Sayward returned or come into the state of Washington. To this complaint defendant demurred, on the ground that it did not "state facts sufficient to constitute a cause of action." The demurrer was overruled, and defendant excepted; and thereupon answered, denying the allegations of the complaint except that he was the owner of the mills for the manufacture of lumber mentioned therein; averred that he was never served with process in the original action nor appeared therein; and pleaded as affirmative defenses, the statute of limitations and that the executors were discharged from their trust and were not competent to bring the action. The cause was tried by a jury, and, upon the verdict, the executors obtained a judgment against Sayward for the sum of \$17,680.25, whereupon he appealed to the supreme court of the state of Washington, alleging errors, and the judgment was by that court affirmed. The case is reported, in advance of the official series, 39 Pac. Rep. 119. A writ of error from this court was allowed by the chief justice of Washington, and a motion to dismiss was submitted.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state, in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, can not confer jurisdiction upon this court to re-examine the judgment below. *Powell v. Brunswick county*, 150 U. S. 433, 439, and cases cited. 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller v. Texas*, 153 U. S. 535; *Morrison v. Watson*, 154 U. S. 111, 115, and cases cited. 3. That such claim can not be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Loeber v. Schroeder*, 149 U. S. 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler v. Gage*, 138 U. S. 52, and cases cited. 5. Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule. *Gibson v. Chouteau*, 8 Wall. 314; *Parmelee v. Lawrence*, 11 Wall. 36; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477, 484; *United States v. Taylor*, 147 U. S. 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt v. Sheldon*, 1 Black, 518; *Marwell v. Newbold*, 18 How. 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deduc-

ible from the record before the state court can be held to have disposed of such federal question by its decision. *Powell v. Brunswick County*, 150 U. S. 400, 433.

Tested by these principles it is quite apparent that this writ of error must be dismissed.

The errors assigned, question the various rulings of the trial court, which were passed on and sustained by the supreme court, but of these, reference need be made to but two, namely, in respect of the admission in evidence of the judgment recovered by Haller against Crawford, and the exclusion of evidence offered to show that Sayward was not liable to Haller to the extent of the judgment recovered by Haller against Crawford. The contention is that the result of the rulings and decisions of the trial court in these respects, as affirmed by the supreme court, was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action "in which he was not a party and of which he had no notice;" and that this was in effect to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the constitution of being protected from such deprivation or denial.

But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below.

The supreme court treated the subject of the admission of the judgment as follows:

"The next contention grows out of the action of the court in admitting in evidence a copy of the judgment upon which the money sought to be recovered had been paid by plaintiffs. The reason for objecting to the introduction of this copy was that the defendant had not been served with process in the action, and could not be affected by the judgment. Authorities have been cited to establish the doctrine that one not served with process in an action is not bound by a judgment rendered therein; but they are none of them in point, under the cir-

cumstances of this case. A judgment against the sureties, rendered without their consent, and especially after a defense made in good faith by them, is at least *prima facie* sufficient to authorize them to recover of their principal the amount which they have been called upon to pay thereon; and if the principal had knowledge of the pendency of the action, even though he was not served with process therein, the judgment rendered against the sureties, without fault on their part, would be conclusive in an action by them to recover money which they had paid on account of such judgment."

And, as to the exclusion of evidence complained of, the supreme court said:

"The foundation of the next allegation of error is stated by the appellant as follows: 'In a suit by surety for subrogation, principal entitled to use every legal defense.' This is not an exact statement of the principle which it is claimed was negatived by the court upon the trial. The plaintiffs did not seek a technical subrogation to the rights of the plaintiff in the original action; they sought an independent recovery of money which they had paid on account of the defendant, and introduced the judgment only for the purpose of showing that such payment was not a voluntary one. As stated before, the weight of authority is to the effect that a judgment like the one sought to be introduced in the case at bar is at least *prima facie* evidence as against the principal; and that it is conclusive unless some collusion or fraud upon the part of the surety is shown. The testimony offered by the defendant did not tend to show any such fraud or collusion, and, if it did, it was not competent under the pleadings. There was no sufficient allegation of fraud or collusion on the part of the sureties in the answer. Besides, we think the evidence disclosed a state of facts from which it could be fairly presumed that defendant had notice of the pendency of the former suit."

We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the constitution of the United States from

the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law can not be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error. Writ of error dismissed.

See *Davidson v. New Orleans*, 96 U. S. 97, for discussion of "due process of law" as a prolific source of jurisdiction of supreme court from state court on error.

b. Appeal by action of court.

(a) By certification from circuit court of appeals.

SAUNDERS v. GOULD.

Reported in 4 Peters, 392.

(1830.)

THIS case came before the court on a certificate of a division of opinion by the judges of the circuit court for the district of Rhode Island. It was submitted, without argument, by Coxe, for the plaintiff in error; and Whipple, for the defendant.

MARSHALL, Chief Justice, stated: When this case was brought before the court, it was admitted by the counsel to be essentially the same with *Gardner v. Collins*, reported in 2 Pet. 58; but he relied on certain evidence which he exhibited, of a settled judicial construction of the act on which the cause depended, different from that which had been made by this court. Had the court been satisfied on this point, that settled construction would undoubtedly have been respected. But the court was not convinced that the construction which prevails in Rhode Island is opposed to that which was made by this court. On communicating this decision to the bar, counsel declined arguing the cause; and a certificate, similar to that which was given in the former case, was about to be prepared; but on inspecting the record, it was perceived, that the judges of the circuit court, instead of dividing on one or more points, had divided on the whole cause; and had directed the whole case to be certified to this court. Considering this as irregular, the court

directs the cause to be remanded to the circuit court; that further proceedings may be had therein according to law.

The legislation concerning review by certificate may be found in 2 Stat. L. 156, April 29, 1802; 17 Stat. L. 196, June 1, 1872; 26 Stat. L. 826; March 3, 1891; 36 Stat. L. 1157, March 3, 1911. (Judicial Code, 1911, Sections 238, 239, 240.)

WHITE v. TURK.

Reported in 12 Peters, 238.

(1838.)

CERTIFICATE of division from the circuit court of East Tennessee.

MCKINLEY, Justice, delivered the opinion of the court: This is a case certified to this court from the circuit court of the United States for the eastern district of Tennessee. A petition was filed by the defendants, Vaughan and Grant, stating that a judgment had been rendered in that court, in favor of the plaintiff, against the said Turk, at the October term, 1834, for the sum of \$893.67; that said Turk had been arrested upon a *ca. sa.*, issued upon said judgment, and that the other two defendants had become his sureties in a bond, with condition that he should make his personal appearance at the court house in Knoxville, on the second Monday of October next thereafter; then and there to pay a debt recovered by James White, in said suit against said Turk, for \$866.21½, take the oath of insolvency, or make a surrender of his property, as prescribed by the laws of the state; otherwise, the bond to remain in full force and virtue; that this bond, together with the *ca. sa.*, had been returned to said court, at its October term, 1835, and judgment rendered thereon against all the defendants, upon a motion, and without notice to them of the motion. For reasons stated in the petition, they prayed for and obtained a *supersedeas*.

At the October term 1836, of said court, "on a motion being made to set aside the judgment, for the reasons assigned in the petition; and on the ground, that the statutes of the state of Tennessee, referred to in the petition, and under which the bond was taken, and the judgment on it rendered, are a part of the insolvent laws of the state, and can not apply to proceedings on

an execution issued from the federal court; and on a full consideration of the subject, the opinions of the judges were opposed on the following points.

“1st. Whether the omission to name in the bond the sum called for in the execution, and the naming of a different sum, does not vitiate it? 2d. Whether the omission to state in the bond the court before which the defendant is to appear, take the oath of insolvency, or surrender his property, does not vitiate it? 3d. Whether the omission to set out in the bond, the writ of execution, or refer to it, does not vitiate it? 4th. Whether the proceedings authorized by the statutes of the state of Tennessee, passed in 1824, ch. 17, and in 1825, ch. 57, can apply to the federal courts? 5th. Whether, on account of the above defects, the bond is not void, and the proceedings on it, under the above statutes, consequently, a nullity?”

The intention of congress, in passing the act under which this proceeding has taken place, was, that a division of the judges of the circuit court, upon a single and material point, in the progress of the cause, should be certified to this court, for its opinion; and not the whole cause. The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the circuit court, by the motion to set aside the judgment on the bond. And had the court agreed in opinion, and rendered a judgment upon the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction. *United States v. Bailey*, 9 Pet. 267; *Adams v. Jones*, decided at the present term of this court (*ante*, p. 207).

For these reasons, the cause is remanded to the circuit court, this court not having jurisdiction of the questions, as stated. Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record, from the circuit court of the United States for the district of East Tennessee, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the whole

case has been certified to this court; and as it has been repeatedly decided by this court, that the whole case can not be adjourned on a division of the judges, the court can not decide this case in its present form. Whereupon, it is now here ordered and adjudged by this court, that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice; this court not having jurisdiction over the case, as stated.

In *Wilson v. Barnum*, 8 How. 258, the question certified was purely one of fact as to the substantial identity of two machines, and the court held it had no jurisdiction of questions of fact.

In *Waterville v. Van Slyke*, 116 U. S. 699, the court says: "We repeat that this procedure is not intended to enable the parties in the circuit court to bring up the entire case to be retried here. It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case, arises, on which, differing, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate, but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained. Such a case is this, and it is accordingly *dismissed*."

BALTIMORE & OHIO R. R. CO.

v.

INTERSTATE COMMERCE COMMISSION.

Reported in 215 U. S. 216.

(1909.)

THIS was a bill in equity filed by the Baltimore and Ohio Railroad Company in the circuit court of the United States for the district of Maryland against the Interstate Commerce Commission, July 20, 1908, which prayed for a preliminary injunction and a final decree enjoining, annulling and suspending a certain order of the commission served June 24, 1908, in a proceeding before the commission entitled "Rail and River Coal Company v. Baltimore and Ohio Railroad Company."

On July 27, 1908, the attorney general, in compliance with Section 16 of the act to regulate commerce, as amended by the Act of June 29, 1906, filed in the court the certificate of general public importance under the expedition Act of February 11,

1903. In accordance with the provisions of the Act of February 11, 1903, the two circuit judges, by order filed August 26, 1908, designated the Honorable Thomas J. Morris, district judge for the district of Maryland, to sit with them on the hearing and disposition of the case.

The application for the preliminary injunction was set for hearing September 22, 1908. Defendant's answer was filed September 23, 1908, the application for the preliminary injunction was denied.

Replication was filed and testimony taken, and, there being no substantial dispute as to the facts, Mr. Arthur Hale, complainant's general superintendent of transportation, and also chairman of the car efficiency committee of the American Railway Association, was able to testify as to all matters that counsel deemed necessary to bring to the court's attention, and was the only witness.

December 14, 1908, the cause came on for final hearing, and was argued before the two circuit judges and the district judge designated by them. No final decree or judgment was entered, but the presiding judge entered the following order:

"This cause came on this day to be further heard, and was argued by counsel, and the court having fully considered the bill, answer, deposition and other papers filed therein, the judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

"It is now ordered, that in accordance with the act of congress applicable hereto, that this case be certified for review to the supreme court of the United States.

"December 14, 1908."

The cause was docketed in this court and the transcript of record filed January 25, 1909, as "On a certificate from the circuit court of the United States for the district of Maryland."

The Act of Congress of February 11, 1903, c. 544, 32 Stat. 823, contains two sections, as follows:

"(1) That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,'

approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted wherein the United States is complainant, the attorney general may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the supreme court for review in like manner as if taken there by appeal as hereinafter provided.

“SECTION 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the supreme court and must be taken within sixty days from the entry thereof: Provided, That in any case where an appeal may have been taken from the final decree of the circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the supreme court in the manner now provided by law.”

SECTION 16 of the Hepburn Act, so called, of June 29, 1906, c. 3591, 34 Stat. 584, 592, provides:

“The venue of suits brought in any of the circuit courts of the United States against the commission to enjoin, set aside, annul, or suspend any order or requirement of the commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. * * *

“The provisions of ‘An act to expedite the hearing and determination of suits in equity, and so forth,’ approved Febru-

ary eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the commission, or any of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the attorney general in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the supreme court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. * * * An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the supreme court of the United States: Provided further, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.”

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court:

By the Judiciary Act of March 3, 1891, a review by certificate is limited to the certificate or its equivalent by the circuit courts, made after final judgment, of the question, when raised, of their jurisdiction as courts of the United States, and to the certificate by the circuit courts of appeal of questions of law in relation to which the advice of this court is sought as therein provided, which certificates are governed by the same rules as were formerly applied to certificates of division. *United States v. Rider*, 163 U. S. 132; *The Paquete Habana*, 175 U. S. 677, 684; *Chicago, Burlington & Quincy Railway Company v. Williams*, 205 U. S. 444. And it has been established by repeated decisions that questions certified to this court upon a division of opinion must be distinct points of law clearly stated so that they can be distinctly answered without regard to other issues of law or of fact; and not questions of fact or of mixed law

and fact involving inferences of fact from particular facts stated in the certificates; nor yet the whole case even if divided into several points. *Jewell v. Knight*, 123 U. S. 426, 433.

And finally it has been settled that the whole case, even when its decision turns upon matter of law only, can not be sent here by certificate of division.

In *White v. Turk*, 12 Pet. 238, it was said: "The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the circuit court, by the motion to set aside the judgment on the bond. And, had the court agreed in opinion, and rendered a judgment upon the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate jurisdiction." This practice was declared irregular by Chief Justice Taney in *Webster v. Cooper*, 10 How. 54, and the chief justice added that it "would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the constitution intended it to be, an appellate court to revise the decisions of inferior tribunals." So Mr. Justice Miller, in *United States v. Perrin*, 131 U. S. 55, 58, said:

"But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the court of the trial, the whole matter shall be referred to this court for its decision in advance of the regular trial, or that, in any event the whole case shall be thus brought before this court.

"Such a system converts the supreme court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

Without discussing the evolution of the use of certificates reference to the legislation given below may be profitable.

In the present case no final judgment or decree or order determinative of the merits was rendered, but the court ordered

“that this case be certified for review to the supreme court of the United States,” and that “a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said supreme court of the United States; and the same is transmitted accordingly.”

The Act of Congress of February 11, 1903, provided in its first section that on the certificate of the attorney general the case should be assigned for hearing before not less than three judges, and that “in the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the supreme court for review in like manner as if taken there by appeal as hereinafter provided.” The order of the circuit court pursues the language of this provision and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction, and can not be sustained.

In a note to *United States v. Ferreira*, 13 How. 40, 52, which was inserted by order of the court, the chief justice states the substance of the case of the *United States v. Yale Todd*, which was decided in February, 1794, but not printed, as there was at that time no official reporter. This note thus concludes:

“In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd’s case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress can not enlarge it. In all other cases its power must be appellate.”

Such is the settled rule, and it is inadmissible to suppose that is was the intention of congress to run counter to it.

Ordinarily in the federal courts, in the absence of express statutory authority, no appeal can be taken or writ of error brought except from a final decree or to a final judgment. *McLish v. Roff*, 141 U. S. 661, 665; *Forgay v. Conrad*, 6 How. 201, 205. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would

lie. *The Alicia*, 7 Wall. 571, is in point. In that case it appeared that on the ninth day of January, 1863, a decree of condemnation had been entered in the district court against the *Alicia* and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the circuit court; and on the eighteenth of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the circuit court, no order, judgment or decree in the case—for the transfer of the cause to this court under the thirteenth section of the Act of June 30, 1864, which enacted that prize causes, depending in the circuit court, might be so transferred. This court held that the cause was removed to the circuit court by the appeal from the decree of the district court and that that decree was vacated by the appeal, and that the circuit court acquired full jurisdiction of the cause and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said (p. 573): “Nor can it be doubted that, under the constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the constitution, and, consequently, that the order of transfer was without effect. The cause is still depending in the circuit court.”

The result is that the order must be set aside and the case remanded to the circuit court with directions to proceed in conformity with law. *Ordered accordingly.*

UNITED STATES v. DANIEL.

Reported in 6 Wheaton, 542.

(1821.)

THIS was an indictment in the circuit court of South Carolina, against Lewis Daniel, charging him with having knowledge of the actual commission of the crime of willful murder, committed on the high sea, by John Furlong; and with unlawfully, wickedly and maliciously, concealing the same, etc.

The indictment set forth, at large, the indictment and conviction of John Furlong, for willful murder on the high seas, and then charged Lewis Daniel with the knowledge and concealment of that murder, and with not having disclosed the same, in the words of the act of congress. The prisoner was tried on the plea of not guilty. It was proved, that some of the persons present on board, when the principal felony was committed, had, in conversation, stated the fact of the murder to the defendant, who advised them to escape, promised secrecy, offered them the means of escape, and actually assisted one of them in escaping; but there was no evidence that the defendant knew of any fact, which would have constituted legal evidence on the trial of the principal felon. The judge charged the jury, that the concealment, under the circumstances, was sufficient to convict the defendant, and the jury found a verdict of guilty. The defendant then moved in arrest of judgment, and for a new trial, on the following grounds: That a person is not liable to be indicted and convicted under the 5th section of the Act of April, 1790, c. 36, for the punishment of certain crimes against the United States, unless he has such knowledge of the felony as will enable him to testify in court, at the trial of the principal felon, and particularly, that in this case, the evidence did not prove the defendant guilty of misprision of murder, according to the terms of the said act. The motion was also supported by an alleged misdirection of the court to the jury. The judges being divided in opinion on this motion, it was ordered to be certified to this court.

(March 15, 1821.)

MARSHALL, Chief Justice, delivered the opinion of the court: The indictment in this case is certainly sufficient to sustain a judgment, according to the verdict, and all the other proceedings are regular. There is, therefore, no cause for arresting the judgment.

The motion for a new trial has never before been brought to this court on a division of opinion in the circuit court. It had been decided, that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seemed entitled to great weight, when urged against determin-

ing such a motion in this court, in a case where the judges at the circuits were divided on it. When we considered the motives which must have operated with the legislature for introducing this clause into the Judiciary Act of 1802, we were satisfied, that it could not be intended to apply to motions for a new trial.

Previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the supreme court should attend, and a division should take place, the cause was continued until the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case, that opinion should be the judgment of the court. But the Act of 1802, made the judges of the supreme court stationary, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system, was attended with this difficulty. The court being always composed of the same two judges, any division of opinion would remain, and the question would continue unsettled. To remedy this inconvenience, the clause under consideration was introduced. Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings in the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands. There is nothing, then, in the reason of the provision which would apply it to this case.

Although the words of the act direct, generally, "that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen shall" be certified, etc., yet it is apparent, that the question must be one which arises in a cause depending before the court, relative to a proceeding belonging to the cause. The first proviso is, "That nothing herein contained shall prevent the cause from proceeding, if,

in the opinion of the court, further proceedings can be had, without prejudice to the merits.”

It was also contended, that under the second proviso, Lewis Daniel ought to be discharged; that proviso is in these words: “And provided also that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment.” A motion for a new trial is not “The question touching the said imprisonment or punishment.” That question must arise on the law, as applicable to the case; and is not, it would seem, to be referred to this court. The proviso, if applicable to such a case as this, would direct the circuit court not to certify their division of opinion to this court, but, in consequence of that division, to enter a judgment for the defendant. This court can only decide the question referred to it, and certify its opinion upon that question to the circuit court, who will then determine what judgment it is proper to render.

UNITED STATES v. RIDER.

Reported in 163 U. S. 132.

(1896.)

ON the twenty-third day of November, A. D., 1891, the United States district attorney for the southern district of Ohio filed a criminal information in the circuit court of the United States for that district against Frank M. Rider, John F. Burgess and Samuel N. Rutledge, charging that on October 15, A. D., 1891, defendants “were then and there the county commissioners in Muskingum county, in the state of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter and keep in repair all necessary bridges over streams and public canals, on all state and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncan’s Falls, Muskingum county, Ohio; and the secretary of war of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum river, one of the navigable streams over which the United States has jurisdiction, on the 19th day

of December, 1890, gave notice in writing to the said defendants, commissioners as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th of January, 1891, was set and named as the day when such evidence should be heard before Lieut. Col. Wm. E. Merrill, Corps of Engineers, at the United States Engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the third day of February, 1891, and afterwards, to wit, on the 25th day of February, 1891, and after said day of hearing, the secretary of war gave notice in writing to said defendants, controlling said bridge as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw span below the new U. S. lock No. 9, in said river, and requiring the following change to be made, viz., the construction of a draw span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice, and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891, and that the service of said notice as aforesaid was made on the 3d day of March, 1891, by delivering, personally, a copy thereof to said commissioners, at their office in Zanesville, Ohio. And the said Frank M. Rider, John F. Burgess and Samuel N. Rutledge, county commissioners of Muskingum county, Ohio, as aforesaid, did unlawfully, on, to wit, the fifteenth day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required, from the secretary of war, and within the time prescribed by him, wilfully fail and refuse to comply with the said order of the secretary of war, and to make the alterations set forth in said notice, contrary to the form of Sections 4 and 5 of an Act of Congress approved September 19, 1890, in such case made and

provided, and against the peace and dignity of the United States of America.”

The defendants were tried December 11, 1891, and found guilty as charged in the information, whereupon they moved for a new trial.

On the trial before the district judge certain questions on the constitutionality of the sections of the Act of September 19, 1890, 26 Stat. 453, c. 907, Sections 4 and 5, under which the information was filed, were reserved for hearing and decision upon a motion for a new trial before the circuit and district judges. The motion coming on to be heard, those judges were divided in opinion, and certified, under Section 697 of the Revised Statutes, the points of disagreement to this court, the questions upon which such division of opinion took place being as follows:

“1st. Whether congress has the power to confer upon the secretary of war the authority attempted to be conferred by said Sections 4 and 5 of the Act of September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river.

“2d. Whether the failure to comply by persons owning and controlling the said bridge with the order of the secretary of war can lawfully subject them to a prosecution for a misdemeanor.”

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court:

The appellate jurisdiction of this court is defined by the acts of congress. By Section 6 of the Act of April 29, 1802, c. 31, 2 Stat. 156, 159, whenever there was a division of opinion in the circuit court upon a question of law, the question might be certified to this court for decision; provided that the case might proceed in the circuit court if in its opinion further proceedings could be had without prejudice to the merits; and that no imprisonment should be allowed or punishment inflicted upon which the judges were divided in opinion.

In *United States v. Daniels*, 6 Wheat. 542, 547, Chief Justice Marshall explained that “previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all the judges were present, no division of opinion could take place. If only

one judge of the supreme court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case that opinion should be the judgment of the court." Act of March 2, 1793, 1 Stat. c. 22, Sections 2, 333; *Davis v. Braden*, 10 Pet. 286. But, continued the chief justice, the Act of 1802 made the judges of the supreme court stationary, so that the same judges constantly attended the same circuit and the court being always composed of the same two judges, any division of opinion would remain and the question continue unsettled. "To remedy this inconvenience, the clause under consideration was introduced." 6 Wheat. 548; *Ex parte Milligan*, 4 Wall. 2.

The Act of April 10, 1869, c. 22, 16 Stat. 44, provided for the appointment of a circuit judge in each circuit, but this did not repeal the Act of 1802, as the same necessity existed as before for the power to certify questions. *Insurance Company v. Dunham*, 11 Wall. 1.

By the Act of June 1, 1872, c. 255, 17 Stat. 196, whenever in any proceedings or suit in a circuit court there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree or order, and a certificate of division of opinion as under the Act of 1802, either party might remove the case to this court on writ of error or appeal, according to the nature of the case. This act continued in force about two years, when it was supplanted by Sections 650, 652 and 693 of the revised statutes, by which its provisions were restricted to civil suits and proceedings; and by Sections 651 and 697 the provisions of Section 6 of the Act of 1802 were re-enacted as to criminal cases. *United States v. Sanges*, 144 U. S. 310, 321. These sections are printed in the margin.

In civil cases, prior to March 3, 1891, the appellate jurisdiction was limited by the sum or value of the matter in dispute, but the jurisdiction on certificate was not dependent thereon, and, after final judgment or decree, if the amount in controversy reached the jurisdictional amount, the whole case

was open for consideration on error or appeal, while, if it fell below that, only the questions certified could be examined. *Allen v. St. Louis Bank*, 120 U. S. 20; *Dow v. Johnson*, 100 U. S. 158. It has always been held that the whole case could not be certified. *Jewell v. Knight*, 123 U. S. 426, 433.

In short, under the revised statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated, and the provision for a certificate operated to give the benefit of review where the amount in controversy was less than that prescribed as essential to our jurisdiction, while as to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed.

The first act of congress which authorized a criminal case to be brought from the circuit court of the United States to this court, except upon a certificate of division of opinion, was the Act of February 6, 1889, c. 113, Sec. 6, 25 Stat. 655, by which it was enacted that "in all cases of conviction" of a "capital crime in any court of the United States," the final judgment "against the respondent" might, on his application, be re-examined, reversed or affirmed by this court on writ of error. Up to that time this court had no general authority to review on error or appeal the judgments of the circuit courts of the United States in cases within their criminal jurisdiction. *United States v. Sanges*, 144 U. S. 310, 319; *Cross v. United States*, 145 U. S. 571, 574.

By Section 4 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, it was provided that "the review, by appeal, by writ of error or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same."

By Section 5 appeals or writs of error might be taken from the circuit court directly to this court in certain enumerated classes of cases, including "cases of conviction of a capital or otherwise infamous crime." And by Section 6 the judgments or decrees of the circuit courts of appeals were made final "in all cases arising under the criminal laws" and in certain other classes of cases, unless questions were certified to this

court, or the whole case ordered up by writ of *certiorari*, as therein provided. *American Construction Co. v. Jacksonville Railway Co.*, 148 U. S. 372, 380. Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals, and in all civil cases by appeal or error without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final as specified in Section 6.

By Section 14 it was provided that "All acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this act are hereby repealed," and the particular question before us is whether Sections 651 and 697 of the Revised Statutes in relation to certificate of division of opinion in criminal cases, though not expressly repealed, still remain in force. If so, and such division of opinion can be certified before final judgment, then all criminal cases, including those in which the judgments and decrees of the circuit courts of appeals are made final (of which the case at bar is one), as well as those which may be brought directly to this court, might, at preliminary stages of the proceedings, be brought before us on certificate, and, after judgment, the whole subject be re-examined on writ of error from one or the other court. This result, in itself, we think could not have been intended, and it is wholly inconsistent with the object of the Act of March 3, 1891, which was to relieve this court and to distribute between it and the circuit courts of appeals, substantially, the entire appellate jurisdiction over the circuit courts of the United States. *McLish v. Roff*, 141 U. S. 661; *Lau Ow Bew's Case*, 144 U. S. 47; *Construction Co. v. Railway Co.*, 148 U. S. 372.

We are of opinion that the scheme of the Act of March 3, 1891, precludes the contention that certificates of division of opinion may still be had under Sections 651 and 697 of the Revised Statutes.

Review by appeal, by writ of error or otherwise, must be as prescribed by the act, and review by certificate is limited by the act to the certificate by the circuit courts, made after

final judgment, of questions raised as to their own jurisdiction and to the certificate by the circuit courts of appeals of questions of law in relation to which our advice is sought as therein provided, and these certificates are governed by the same general rules as were formerly applied to certificates of division. *Maynard v. Hecht*, 151 U. S. 324; *Columbus Watch Co. v. Robbins*, 148 U. S. 266.

It is true that repeals by implication are not favored, but we can not escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the Act of March 3, 1891, covers the whole subject-matter under consideration, and furnished the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.

Its provisions and those of the Revised Statutes in this regard can not stand together, and the argument *ab inconvenienti* that, in cases of doubt below, the remedy by certificate ought to be available, is entitled to no weight in the matter of construction.

The result is that the certificate must be dismissed, and it is so ordered.

Mr. Justice Brewer did not hear the argument and took no part in the decision of this case.

WARNER v. NEW ORLEANS.

Reported in 167 U. S. 467.

(1897.)

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court:

We had occasion in the recent case of *Cross v. Evans*, ante, 60, to comment on the practice of certifying questions in such manner as to practically submit the entire case to this court for consideration. In addition to what was said in the opinion then filed, it may be proper to observe that the purpose of the Act of 1891, creating the courts of appeal, was to vest final jurisdiction as to certain classes of cases in the courts then created, and this in order that the docket of this court might be relieved, and it be enabled with more promptness to dispose of the cases directly coming to it. In order to guard against any injurious results which might flow from having nine appel-

late courts acting independently of each other, power was given to this court to bring before it for decision by *certiorari* any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable, but the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the courts of appeal the right to avoid the responsibility cast upon it by statute by transmitting any case it saw fit to this court for decision. If such practice were tolerated it is easy to perceive that the purpose of the act might be defeated, and the courts of appeal, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of congress they should finally determine. It is true, power was given to the courts of appeal to certify questions, but it is only "questions or propositions of law" which they are authorized to certify. And such questions must be, as held in the case just cited, "distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact." It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon which that question is based. But care must always be taken that under the guise of certifying questions the courts of appeal do not transmit the whole case to us for consideration. Here, in addition to the long preliminary statement of facts, the court ordered up the entire record, and counsel in their briefs, assuming that the whole case is before us, have entered into a discussion of many questions, such as the effect of certain limitations in the constitution of Louisiana, which may have been in the case as it was presented to the court of appeals, but can not be found in any distinct question of law certified to us.

(b) By *certiorari*.

Illustrative of the function of the writ of *certiorari* at common law, see *United States v. Adams*, 9 Wall. 661; *United States v. Young*, 94 U. S. 258.

AMERICAN CONSTRUCTION COMPANY

v.

JACKSONVILLE RAILWAY.

Reported in 148 U. S. 372.

(1893.)

THESE were two petitions to this court, each praying, in the alternative, for a writ of mandamus, or a writ of *certiorari*, to the United States circuit court of appeals for the fifth circuit.

In the first case, No. 14, it appeared that the following proceedings were had in the circuit court of the United States for the northern district of Florida.

On July 6, 1892, the American Construction Company, a corporation of Illinois, and a stockholder in the Jacksonville, Tampa and Key West Railway Company, a corporation of Florida, engaged in operating a railroad in that state, filed a bill in equity, in behalf of itself and of such other stockholders as might come in, against the railway company, and against its president and directors, citizens of other states; alleging that they had made a contract in its behalf, which was illegal and void, and unjust to its stockholders, and had declined to have an account taken and praying for an account, a receiver and an injunction.

On the filing of the bill, Judge Swayne, the district judge, made a restraining order, by which, until the plaintiff's motion for an injunction and for the appointment of a receiver could be heard and determined, the railway company and its officers and agents were enjoined and restrained from remitting, sending or removing any of its income, tolls and revenues from the jurisdiction of the court, and from selling, disposing of, hypothecating or pledging any of its bonds of a certain issue at less than their par value.

On August 4, 1892, Judge Swayne, after a hearing of the parties, made an order, appointing Mason Young receiver of all the property of the railroad company; enjoining the railway company, its officers and agents, and all persons in possession of its property, from interfering with the possession, control, management and operation of the property, and from obstructing the exercise of the receiver's rights and powers, or the

performance of his duties; and continuing the restraining order of July 6, until the further order of the court.

On August 5, Judge Swayne, on a petition of the receiver, and after hearing him and the parties, made an order, authorizing him to pay certain interest and obligations of the railway company out of the income and money coming into his hands as receiver, or, if those should be insufficient for that purpose, to issue receiver's notes in payment of such interest and obligations, or, at his discretion, to borrow money on such receiver's notes, for that purpose, the amount of such notes, outstanding at one time, not to exceed \$125,000.

On August 27, the railway company prayed and was allowed an appeal from the orders of August 4 and August 5 to the United States circuit court of appeals for the fifth circuit, and gave bond to prosecute the appeal.

On November 18, the construction company moved the circuit court of appeals to dismiss the appeal, because that court had no jurisdiction to review the action of the circuit court in making those orders or either of them.

On January 16, 1893, the circuit court of appeals, held by Circuit Judges Pardee and McCormick and District Judge Locke, denied the motion to dismiss the appeal; and entered a decree, reversing and setting aside the orders appealed from, except as to the injunction; modifying the injunction so as to permit the railway company to send away money for the payment of its bonds which had been regularly sold, and for the purchase of necessary equipment and supplies, and to restrain it from disposing of, at less than their par value, such only of the bonds of the issue mentioned, as remained the property of the company; and instructing the circuit court to modify accordingly the restraining order of July 6, continued by the order of August 4, and to vacate the order of August 4, appointing a receiver, to discharge the receiver, and to restore the property of the company to its officers.

On January 23, the construction company filed a petition for a rehearing, upon the grounds, among others, that the circuit court of appeals had no jurisdiction to review an order appointing a receiver; and that its decree did not allow the receiver time to settle his accounts, nor provide for the payment of his notes in the hands of *bona fide* holders for value.

On January 30, the circuit court of appeals denied a rehearing, and sent down a mandate in accordance with its decree; and on February 1, the mandate was filed in the circuit court.

On February 2, the construction company moved this court for leave to file a petition for a writ of mandamus to the circuit court of appeals to dismiss so much of the appeal of the railway company as undertook to bring before that court the action of the circuit court in appointing a receiver, and in authorizing him to borrow money upon receiver's notes; or, in the alternative, for a writ of *certiorari* to the circuit court of appeals to bring up its decree for review by this court.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court:

* * * (Here follows discussion of constitution and early statutes relating to appeal and mandamus, and then the opinion continues:)

This court, and the circuit and district courts of the United States, have also been empowered by congress "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Act of September 24, 1789, c. 20, Sec. 14, 1 Stat. 81; Rev. Stat. Sec. 716.

Under this provision, the court might doubtless issue writs of *certiorari*, in proper cases. But the writ of *certiorari* has not been issued as freely by this court as by the court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler v. Lindsey*, 3 Dall. 411, 413; *Patterson v. United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton v. Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States v. Adams*, 9 Wall. 661; *United States v. Young*, 94 U. S. 258; *Lurton v. North River Bridge*, 147 U. S. 337, 341.

There is, therefore, no ground for issuing either a writ of mandamus, or a writ of *certiorari*, as prayed for in these petitions, unless it be found in the Act of March 3, 1891, c. 517,

entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 Stat. 826.

* * * (Here follows discussion of Sections 4, 5, 6, 7 and 12, for which see Appendix, and opinion then continues:)

The effect of these provisions is that, in any case in which the jurisdiction of the circuit court depends entirely on the citizenship of the parties (as in the cases now before us), and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the circuit court of appeals only; and the judgments of the latter court are final, unless either that court certifies questions or propositions of law to this court, or else this court, by *certiorari* or otherwise, orders the whole case to be sent up for its review and determination.

The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States. *McLish v. Roff*, 141 U. S. 661, 666; *Lau Ow Bew's Case*, 141 U. S. 583, and 144 U. S. 47.

The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the circuit court of appeals, and making the judgments of that court final, except in extraordinary cases.

It has accordingly been adjudged that a writ of error or appeal directly to this court under Section 5, in a case concerning the jurisdiction of the circuit court, does not lie until after final judgment, and can not, therefore, be taken from an order of the circuit court remanding a case to a state court, there being, as said by Mr. Justice Lamar, speaking for this court, "no

provision in the act, which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts, as to extend the jurisdiction of the supreme court to the review of jurisdictional cases in advance of the final judgments upon them." *McLish v. Roff*, above cited; *Chicago, etc., Railway v. Roberts*, 141 U. S. 690.

It has also been determined that, in the grant of the appellate jurisdiction to the circuit court of appeals, by Section 6, in all cases other than those in which this court has direct appellate jurisdiction under Section 5, the exception "unless otherwise provided by law" looks only to provisions of the same act, or to contemporaneous or subsequent acts expressly providing otherwise, and does not include provisions of earlier statutes. *Lau Ow Bew v. United States*, 144 U. S. 47, 57; *Hubbard v. Soby*, 146 U. S. 56.

In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that "in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court," has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew's Case*, 141 U. S. 583, and 144 U. S. 47; *In re Woods*, 143 U. S. 202. Accordingly, while there have been many applications to this court for writs of *certiorari* to the circuit court of appeals under this provision, two only have been granted: the one in *Lau Ow Bew's Case*, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner*, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the circuit court of appeals for the second circuit reversed a decree of the district judge, and was dissented from by one of the three circuit judges; and in each

of those cases the circuit court of appeals had declined to certify the question to this court.

There are much stronger reasons against the interposition of this court to review a decree made by the circuit court of appeals on appeal from an interlocutory order, than in the case of a final decree. Before the Act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the Act of 1891 is that allowed by Section 7 to the circuit court of appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in *Keystone Co. v. Martin*, 132 U. S. 91, and in *McGourkey v. Toledo & Ohio Central Railway*, 146 U. S. 536. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

In such an exceptional case, the power and the duty of this court to require, by *certiorari* or otherwise, the case to be sent up for review and determination, can not well be denied, as will appear if the provision now in question is considered in connection with the preceding provisions for the interposition of this court in cases brought before the circuit court of appeals. In the first place, the circuit court of appeals is authorized, "in every such subject within its appellate jurisdiction," and "at any time," to certify to this court "any questions or propositions of law," concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instructions thereon, or may require the whole record and cause to be sent up for

its consideration and decision. Then follows the provision in question, conferring upon this court authority "in any such case as is hereinbefore made final in the circuit court of appeals," to require, by *certiorari* or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the circuit court of appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the circuit court of appeals, in this regard, is to cases "made final in the circuit court of appeals," that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before final judgment in the circuit court of appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by *certiorari* or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.

In the first of the cases now before us, the appeal was clearly well taken from the order of the circuit court, so far, at least, as the injunction was concerned. If the circuit court of appeals, on the hearing of that appeal, erred in going beyond a modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes, the error was one in the judicial determination of a case within the jurisdiction of that court, and neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant this court in undertaking to control the cause at this stage of the proceedings.

In the first case, therefore, the writ of *certiorari* prayed for is denied, because no reason is shown for issuing it, under the circumstances of the case.

Nor do those circumstances make a case for issuing a writ of mandamus, either to the circuit court of appeals or to the circuit court. The decisions of this court upon applications

for writs of mandamus since the Act of 1891 affirm the principles established in the earlier decisions, before cited. *In re Morrison*, 147 U. S. 14, 26; *In re Hawkins*, 147 U. S. 486; *In re Haberman Manufacturing Co.*, 147 U. S. 525; *Virginia v. Paul*, *ante*, 107, 124.

In the first case, therefore, the writs of mandamus, as well as the writ of *certiorari*, must be denied.

For a discussion of the right to this writ, see *Whitney v. Dick*, 202 U. S. 132; *United States v. Dickinson*, 213 U. S. 92; *McClelland v. Carland*, 217 U. S. 268.

That *certiorari* may issue from the supreme court to a lower court to review judgment in contempt proceedings, see *In re Chetwood, Petr.*, 165 U. S. 443.

5. FINAL DECREE.

For *orders*, *judgments* and *decrees* reviewable, see note to *Salmon v. Mills*, 13 C. C. A. 372, 374.

RAY v. LAW.

Reported in 3 Cranch, 179.

(1805.)

LAW having a mortgage on real estate in the city of Washington, and Ray having a subsequent mortgage on the same estate, Law had filed his bill in chancery in the circuit court of the district of Columbia, for a foreclosure and sale of the mortgaged property, and made Ray a defendant. The bill having been taken for confessed against Ray, a decree was obtained by Law for a sale. The sale had been made under the decree, and notice given, that on a certain day, the sale would be ratified, unless cause was shown. On that day, Ray appeared, but not showing good cause, in the opinion of the court, the sale was confirmed. Ray prayed an appeal to this court, on the decree for the sale, which the court refused, on the ground, as it is understood, that the decree for the sale was not a final decree in the cause.

Ray, on this day, presented a petition to this court, setting forth those facts, among others, praying relief, and that this court would direct the court below to send up the record. At the same time, he produced sundry papers, purporting to be the substance of that record, but not properly authenticated.

MARSHALL, Chief Justice: The act of congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree.

C. Lee, for the petitioner, contended, that this was a final decree as to Ray, and cited 2 Fowler's Exchequer Practice 195, to show that such a decree would, in England, be considered such a final decree as would authorize an appeal.

(March 5, 1805.)

MARSHALL, Chief Justice: We can do nothing, without seeing the record, and the papers offered can not be considered by us as a record.

The court, however, is of opinion, that a decree for a sale under a mortgage, is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies.

FORGAY v. CONRAD.

Reported in 6 Howard, 201.

(1848.)

MR. CHIEF JUSTICE TANEY delivered the opinion of the court: A motion has been made to dismiss this appeal, upon the ground, that the decree in the circuit court is not a final decree, within the meaning of the Acts of Congress of 1789 and 1803.

The bill was filed by the appellee, as the assignee in bankruptcy of a certain Thomas Banks, in the circuit court of the United States for the district of Louisiana, against the appellants, and Banks, the bankrupt, and three other defendants. The object of the bill was to set aside sundry deeds made by Banks for lands and slaves, which the complainant charged to be fraudulent, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which he alleged had been received by one or more of the defendants, as specifically charged in the bill, which belonged to the bankrupt's estate at the time of his bankruptcy.

The case was proceeded in until it came on for hearing, when the court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him eleven thousand dollars, received from the bankrupt in fraud of his creditors, and "that the complainant do have execution for the several matters aforesaid, in conformity with law and the practice prescribed by the rules of the supreme court of the United States." The decree then directs that the master take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants (who has not appealed) in fraud of the creditors of the bankrupt, and concludes in the following words: "And so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises; and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs."

Among the deeds set aside as fraudulent is one from the bankrupt to Ann Fogarty, otherwise called Ann Wells, for two lots in the city of New Orleans and sundry slaves which she afterwards conveyed to Forgay, the other appellant. Both of these deeds are declared null and void, and the lots, with the improvements thereon, and the negroes, directed to be delivered to the complainant for the benefit of the bankrupt's creditors. This part of the decree is one of the matters of which the complainant was to have execution. But the account of the rents and profits of this property is, like other similar accounts, referred to the master, and reserved for further decree.

The appeal is taken by Samuel L. Forgay and Ann Forgarty, otherwise called Ann Wells; and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to

them at different times and by separate conveyances, as mentioned in the proceedings. And it was not, therefore, necessary that they should join in this appeal. *Todd v. Daniel*, 16 Peters, 523.

The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of congress. Undoubtedly, it is not final in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

In the case of *Whiting v. The Bank of the United States*, 13 Peters, 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground, that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in the case of *Michaud and others v. Girod and others*, 4 Howard, 503.

The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the circuit courts. If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected

to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights. We think upon sound principles of construction, as well as upon the authority of the cases referred to, that such is not the meaning of the acts of congress. And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled. We, however, feel it our duty to say, that we can not approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal.

In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and

therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the circuit court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practised in the English chancery jurisdiction and as restricted by the act of congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise, where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.

In the case before us, for example, it would certainly have been proper, and entirely consistent with chancery practice, for the circuit court to have announced in an interlocutory order or decree the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a final decree annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be

brought here and decided in one appeal, and the object and policy of the acts of congress upon this subject carried into effect.

These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced; but in order to call the attention of the circuit courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the acts of congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen, that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the circuit court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one.

ORDER.

On consideration of the motion filed by Mr. Sergeant, of counsel for the appellee, to dismiss this appeal, and of the arguments of counsel thereupon had, as well against as in support of the said motion, it is now here ordered by this court, that the said motion be and the same is hereby overruled.

PERKINS v. FOURNIQUET.

Reported in 6 Howard, 206.

(1848.)

MR. CHIEF JUSTICE TANEY delivered the opinion of the court: This, like the case just decided, is a motion to dismiss the appeal, upon the ground, that the decree in the circuit court was not a final one.

In the preceding case, we have stated the construction which this court has given to the Acts of 1789 and 1803 upon this subject; and we have stated it more fully than the case itself required, in order that the circuit courts might distinctly understand the opinion entertained by this court, and to prevent, in future, appeals from decrees and orders merely interlocutory in their character. Appeals from decrees of this description

appear to be a growing evil, imposing at every term useless labor upon the court, and subjecting the parties to unnecessary expense and delay. For, having no jurisdiction in such cases, they are not legally before the court upon the appeal, and must of course be dismissed without any decision upon the matters in dispute.

The case now before us may be stated in a few words. It is an appeal from the circuit court of the United States for the district of Louisiana; and it appears by the record that Harriet J. Fourniquet and Mary T. Ewing are two of seven heirs and representatives of Mary Perkins, who was the wife of the appellant, and who died about twenty years before the filing of this bill; that the appellees above named were the children of a former marriage, and with their respective husbands filed the bill now before us, against the appellant, charging that, during the marriage of the appellant with their mother, there existed a community of acquests and gains in certain property, and praying that the appellant might be compelled to account and pay over the amount due them as heirs of their mother. The appellant denied, in his answer, that any community existed, and the case was proceeded in to hearing, when the circuit court passed a decree declaring that the community did exist, and that the appellees, as heirs of their deceased mother, had a right to recover two-sevenths of all their mother's rights of community which accrued during her marriage with the appellant; and also two-thirds of one seventh, as representatives of so much of the interest of a deceased brother; and referred the matter to a master in chancery, to take and report an account of the acquests and gains; and prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken; and the decree concludes by reserving all other matters in controversy between the parties until the coming in of the master's report.

This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, wherever the complainant is entitled to a partition of property or an account. For the principles upon which an account is

to be stated by the master, or a partition made, can not be prescribed by the court until it first determines the rights of the parties by an interlocutory order or decree; and the case can not proceed to final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings. Because these interlocutory orders and decrees remain under the control of the circuit court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time.

The decree in the case before us being interlocutory only, the appeal must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Louisiana, and was argued by counsel. And it appearing to the court here that the decree of the said circuit court is an interlocutory and not a final decree, it is therefore now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed for the want of jurisdiction.

BOSTWICK v. BRINKERHOFF.

Reported in 106 U. S. 3.
(1882.)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: This was a suit begun in the supreme court of the state of New York by a stockholder in a national bank against the directors, to recover damages for their negligence in the performance of their official duties. A demurrer was filed to the complaint, which raised, among others, the question whether such an action could be brought in a state court. The supreme court at special term sustained the demurrer and dismissed the complaint. This judgment was affirmed at general term. An appeal was then taken to the court of appeals, where it was ordered and adjudged "that the judgment of the general term * * * be

* * * reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs, * * * and to answer the complaint." It was also further ordered that the record and the proceedings in the court of appeals be remitted to the supreme court, "there to be proceeded upon according to law." From this judgment of the court of appeals a writ of error was taken to this court, which the defendant in error now moves to dismiss because the judgment to be reviewed is not a final judgment.

The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. *Whiting v. Bank of United States*, 13 Pet. 6; *Forgay v. Conrad*, 6 How. 201; *Craighead v. Wilson*, 18 Id. 199; *Beebe v. Russell*, 19 Id. 283; *Bronson v. Railroad Company*, 2 Black, 524; *Thomson v. Dean*, 7 Wall. 342; *St. Clair County v. Livingston*, 18 Id. 628; *Parcels v. Johnson*, 20 Id. 653; *Railroad Company v. Swasey*, 23 Id. 405; *Crosby v. Buchanan*, Id. 420; *Commissioners v. Lucas*, 93 U. S. 108. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below can not be brought here on writ of error. *Brown v. Union Bank*, 4 How. 465; *Pepper v. Dunlap*, 5 Id. 51; *Tracy v. Holcombe*, 24 Id. 426; *Moore v. Robbins*, 18 Wall. 588; *McComb v. Knox County*, 91 U. S. 1; *Paker v. White*, 92 Id. 176; *Davis v. Crouch*, 94 Id. 514. This clearly is a judgment of that kind. The highest court of the state has decided that the suit may be maintained in the courts of the state. To that extent the litigation between

the parties has been terminated, so far as the state courts are concerned; but it still remains to decide whether the directors have in fact been guilty of the negligence complained of, and, if so, what damages the stockholders have sustained in consequence of their neglect. The court of appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit. *Writ dismissed.*

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY
COMPANY

v.

SOUTHERN EXPRESS COMPANY.

Reported in 108 U. S. 24.

(1883.)

MOTION to dismiss an appeal. The facts necessary for understanding the merits of the motion are stated thus by the court:

The Southern Express Company, an express carrier, filed its bill in equity against the St. Louis, Iron Mountain & Southern Railway Company, in the circuit court for the eastern district of Missouri, to enjoin the railway company from interfering with or disturbing the express company in the enjoyment of the facilities it then had for the transaction of its express business over the railway company's railroad, so long as the express company conformed to the regulations of the railway company and paid all lawful charges for the business. A preliminary injunction was asked for, and, in this connection, the bill prayed that if any dispute or disagreement should arise between the parties during the pendency of the suit, upon the question of compensation to be paid for transportation, the express company might be permitted to bring the same before the court for decision by way of an interlocutory application. On the filing of the bill the preliminary injunction was granted, which was afterwards modified in some particulars affecting the compensation to be paid and the mode of doing the business.

On the 25th of March, 1882, the court entered a decree containing the following provisions:

“V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

“X. Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

“XI. That the defendant, its officers, agents, servants, and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the

business of the said plaintiff in any manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account or for any other express or other corporation, or for private individuals, reserving to either party a right, at any time hereafter, to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

“It is further ordered, adjudged, and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor.”

On the 29th of March, the railway company prayed an appeal, which was allowed, and on the 15th of May perfected by the approval of the necessary bond. During the same term of the court, but after the appeal bond was accepted and approved, the express company moved the court to grant it the benefit of a reference authorized by Sections V and X of the decree, and a master was appointed to inquire into and report on the matters alleged.

The cause having been duly docketed here, the express company moved to dismiss the appeal, on the ground that the decree appealed from was not a final decree. * * *

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: After stating the facts in the language above cited, he continued: As we have had occasion to say at the present term, in *Bostwick v. Brinkerhoff*, 106 U. S. 3, and *Grant v. Phoenix Insurance Company*, 106 U. S. 429, a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Under this rule we think the present decree is final. The suit was brought to compel the railway company to do the express company's business. The controversy was about the right of the express company to require this to be done on the payment of lawful charges. It was no part of the object of the suit to have it definitely settled what these charges should be for all

time. The point was to establish the liability of the railway company to carry. The decree requires the carriage, and fixes the compensation to be paid. It adjudges costs against the railway company, and awards execution. Nothing more remains to be done by the court to dispose of the case. Inasmuch as the rates properly chargeable for transportation vary according to circumstances, and what was reasonable when the decree was rendered may not always continue to be so, leave is given the parties to apply for a modification of what has been ordered in that particular if they, or either of them, shall desire to do so. In effect the decree requires the railway company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable.

The controversy which the express company has had referred to the master, about the compensation to be paid for the transportation during the pendency of the suit, does not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order are of the same general character as those of a receiver who holds property awaiting the final disposition of a suit. They are incidents of the main litigation, but not necessarily a part of it. The supplemental order, made after the decree, relates only to the settlement of the accounts which accrued pending the suit. *The motion to dismiss is denied.*

See *American Construction Company v. Jacksonville Railway*, 148 U. S. 372, above, for discussion of this question also.

See, for final judgment in criminal case, *Heike v. United States*, 217 U. S. 423.

For a review of cases involving question of finality of decree, see *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 91, and *McGourkey v. T. & O. Ry.*, 146 U. S. 536, each holding the decree therein involved not final.

BANK OF ROUNDOUT v. SMITH.

Reported in 156 U. S. 330.

(1895.)

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court: A decree to be final for the purposes of appeal must leave the case in such condition that if there be an affirmance in this court, the court below will have nothing

to do but execute the decree it has already entered. *Dainese v. Kendall*, 119 U. S. 53. In this case the record contains no decree disposing of the case as to all the parties. The orders were as follows: December 3, 1890: "This cause having come on to be heard at the November term, 1890, upon the demurrer of Daniel C. Stelling to the bill of complaint herein, and counsel on both sides having been heard: It is thereupon adjudged and decreed that the said demurrer be sustained." On the same day the following appears: "The complainant in the above-entitled cause having in open court, at the present term of this court, prayed that an appeal be allowed to it from the judgment of this court sustaining the demurrer of Daniel C. Stelling, defendant, and dismissing the bill: It is ordered that said appeal be allowed." On March 14, 1891, the appeal was perfected as to Stelling by giving a bond in the sum of \$250 running to Stelling, and reciting that lately at a regular term of the circuit court "a decree was rendered against the said complainant on the demurrer of said Daniel C. Stelling, dismissing said bill against the said defendant, Daniel C. Stelling, and the said complainant having obtained leave to appeal to the supreme court of the United States from said decree," etc. The errors assigned are to the action of the circuit court "in sustaining the demurrer of defendant Daniel C. Stelling, and in dismissing the bill as to said Daniel C. Stelling, defendant." And appellant's counsel designating among the parts of the record necessary for the consideration of the errors upon which he intended to rely: "The decree of the circuit court sustaining the demurrer and dismissing the bill of complaint as to Daniel C. Stelling."

So far as appears the case stands at issue below as to the defendants other than Stelling, and the whole cause has not been finally determined in the circuit court. It can not be divided so as to bring up successively distinct parts of it, and the decree is not a final decree.

It may be that if the order of the circuit court were affirmed appellant would abandon further effort against the other defendants, while it is clear enough that if the order were reversed the case would be proceeded in against them all; but it is useless to speculate on the subject, as this appeal manifestly falls within the general rule.

In *Mendenhall v. Hall*, 134 U. S. 559, the suit was brought by Mendenhall against Clark N. Hall and Charles F. Hall. Charles F. Hall demurred and filed a special plea to the bill. Clark N. Hall also demurred. The demurrer and plea of Charles F. Hall were both sustained, and by a decree entered May 13, 1885, the bill was dismissed as to him. The demurrer of Clark N. Hall was overruled, and he answered, and the cause went to decree against him April 14, 1886. An appeal was taken to this court by the plaintiff, who executed an appeal bond which ran "to the defendants." Charles F. Hall was not served with notice of the appeal, and when the case was reached on our docket and that fact appeared, a citation was directed to be served upon him, or, if he was dead, upon his representative. The citation was executed upon his widow, who was also administratrix of his estate. On the argument here, it was suggested that no appeal had been taken as to Charles F. Hall, and that this court was without jurisdiction over the case as to him, but we held that the appeal brought before us not only the final decree of 1886, but also that of 1885, sustaining the demurrer and plea of Charles F. Hall and dismissing the suit as to him, and that it was not necessary to take an appeal from the latter order until after the whole case was determined in the court below.

In *Hill v. Chicago & Evanston Railroad*, 140 U. S. 52, a decree had been rendered June 8, 1885, dismissing a bill as to certain parties for want of equity, and denying relief to complainant upon all matters and things in controversy except as to an amount of money paid by one of the defendants, and for the purpose of ascertaining that amount the case was retained as to some of the defendants, which finally resulted in a decree, July 14, 1887, as to that severable matter. It was held that, under these circumstances, the decree of June 8, 1885, was a final decree as to all matters determined by it, and that its finality was not affected by the fact that there was left to be determined a further severable matter, in respect of which the case was retained only as against the parties interested in that matter. An appeal had been prayed from the decree of June 8, 1885, but the transcript of the record not having been filed here at the next term after the appeal was taken, it was, on

motion, dismissed. *Hill v. Chicago & Evanston Railroad*, 129 U. S. 170.

This decree can not, however, be brought within the exception created by the peculiar circumstances of that case.

As the order upon the demurrer did not dispose of the whole case, the decree is not final, and we can not entertain jurisdiction. *Appeal dismissed.*

See *Hultberg v. Anderson*, 214 Fed. Rep. 349, for finality of order in contempt proceeding, and distinguishing a punitive contempt order from one purely remedial.

In *Gibbons v. Ogden*, 6 Wh. 448, it is said that a decree of the highest state court affirming one of the lower court refusing to dissolve an injunction, is not a final decree, from which appeal lies to United States supreme court.

PROCEDURE

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PROCEDURE

In further illustration of procedure in the federal courts the transcripts of the records in four cases in the United States supreme court are given in somewhat abridged form; by cross-reference among them the forms and steps of importance may be found, since a lack of space prevents printing in one case a form which may be found adequately in one of the other cases, *e. g.*, a writ of error or a citation on appeal.

Complete records for further work may be had for the asking from the clerks of the various circuit courts of appeals and the clerk of the supreme court of the United States; the records here submitted will furnish the basis for intensive study.

The student is referred especially to Rose's Code of Civil Procedure; Simkins, A Suit in Equity and A Suit at Law; Foster, Federal Practice; Whitehouse, Equity Practice, Federal and State, and Hughes Federal Procedure, and for the court rules, to Dewhurst, Rules of Practice; for equity rules, Hopkins Federal Equity Rules is excellent, since it provides a historic view. Numerous other works will be found in the Bibliography above.

(24,574)

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 830.

(See 239 U. S. 33; 219 Fed. 273.)

WILLIAM TRUAX, SR., WILEY E. JONES, Attorney General of
the State of Arizona, and W. G. GILMORE, County At-
torney of Cochise County, Arizona, *Appellants*,

vs.

MIKE RAICH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF ARIZONA.

TRANSCRIPT OF THE RECORD.

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1. In the District Court of the United States in and for the District of Arizona. In Equity.

No. E-9 (Tucson).

MIKE RIACH, Plaintiff,

VS.

WILLIAM TRUAX, SR., WILEY E. JONES, Attorney General of the State of Arizona, and W. G. GILMORE, County Attorney of Cochise County, Defendants.

BILL OF COMPLAINT.

To the Honorable Judges of the District Court aforesaid:

Mike Riach, as complainant, brings this his bill of complaint against said defendants, and each of them, and thereupon your orator complains and says:

1. Complainant is a native of Austria, and is an alien under the laws of the United States of America, and is not a qualified elector under the laws of the state of Arizona, and has not, and can not by reason of his status as an alien, become such qualified elector unless and until he shall have first become a citizen of the United States. Complainant is an inhabitant and resident of Cochise county, in the state of Arizona, and is lawfully within the territorial limits of the United States of America. Said William Truax, Sr., is the owner and proprietor of a certain restaurant in the city of Bisbee, Cochise county, Arizona, and as such employs nine employees or workers in the conduct of his said restaurant business, seven of whom are neither native-born citizens of the United States, nor qualified electors, but who are on the contrary aliens, under the laws of the United States of America. That Wiley E. Jones is the attorney general of the state of Arizona, and W. G. Gilmore is the county attorney of Cochise county in said state, said last named defendant, in their respective capacities named, holding office under and by virtue of the laws of the state of Arizona.

2. Complainant is now and for some time last past has been in the employ of said defendant William Truax, Sr., in his said restaurant business so conducted at Bisbee, Cochise county, Arizona, such employment being that of a cook.

3. Under the laws of the state of Arizona it is the duty of the attorney general thereof, amongst other things, to attend the supreme court of said state and to prosecute or defend all cases to which said state, or any officer thereof, in his official capacity, is a party, and when required by the public service or directed by the governor, to repair to any county in the state and assist the county attorney thereof in the discharge of his duties; and it is the duty of said county attorney of Cochise county to attend the superior and other courts, and conduct, on behalf of said state, all prosecutions for public offenses; that under the laws of said state all prosecutions for public offenses under the laws are conducted in the name of said state, and by its authority, and it is the party defendant in all such prosecutions, and as such is represented by said W. G. Gilmore, county attorney, for all prosecutions in said Cochise county, and by said Wiley Jones as attorney general in the cases referred to and mentioned hereinabove.

4. At an election held in said state on the third day of November, 1914, there was, under and in accordance with the provision of paragraph 3328, Revised Statutes of Arizona, 1913, submitted to the qualified voters of said state for their approval or rejection, under what is known as the initiative clause and provisions of the constitution of Arizona, being Section 1 of Article IV of said constitution, a certain proposed measure, which is in the words and figures as follows, to wit:

“An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof,

“Be it enacted by the people of the state of Arizona:

“SECTION 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the state of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent. qualified electors or native-born citizens of the United States or some subdivision thereof.

“SECTION 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of

violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred (\$100.00) dollars, and imprisoned for not less than thirty (30) days.

“SECTION 3. Any employee who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred (\$100.00) dollars, and imprisoned for not less than thirty (30) days.”

At said election said measure did, as your complainant is informed and believes and therefore alleges the fact to be, receive in its favor and for its approval, a majority of the votes cast upon the question so submitted; under the provisions of Subdivision 13, Section 1, of Article IV of the constitution of the state of Arizona, it is provided that it shall be the duty of the secretary of state, in the presence of the governor and the chief justice of the supreme court of said state, to canvass the votes for and against such measure within thirty days after the said election, and upon the completion of the canvass the governor shall forthwith issue a proclamation, giving the whole number of votes cast for and against such measure, and to declare the said measure, the same being approved by a majority of those voting thereon, to be law. Said requirements have been complied with, and said proclamation of the governor of said state, in accordance therewith, has been made, the proclamation having been issued on the 14th day of December, 1914, and said measure is now a law within and of said state.

5. On the 9th day of December, 1914, said Truax did inform complainant that as soon as said pretended law should be proclaimed, and solely by reason thereof, and because he feared to incur its penalties if he should violate the terms thereof, he would discharge complainant from his employment aforesaid. Complainant further avers that said defendant Truax will, unless restrained by an order of this court, carry out his said intention to discharge complainant, and that such discharge will be made solely for the reason that complainant is neither a native-born citizen of the United States, nor a qualified elector within the meaning of said law, and because he is an alien.

6. Complainant further avers on information and belief that but for the passage of said pretended law, and but for its apparent sanction and force as a law of the state of Arizona, and but for the fact that said act by its terms inflicts a heavy penalty upon any employer violating the same, and but for the fear said defendant Truax has that the penalties thereof will be visited upon him, in case of any violation thereof, this complainant would not be disturbed in his said employment and would continue therein and continue to enjoy his salary and wage for such service, and that the grounds and reasons aforesaid are the only grounds and reasons existing, and upon which said defendant Truax will act in discharging this complainant from his service aforesaid, and that the services of complainant are entirely satisfactory to said Truax, and that he would in fact continue complainant in his said employment if such act had not been so adopted, because he would prefer the services of complainant to those of any other employee it is not possible or practicable to engage to perform the services now being performed by complainant, as herein alleged.

7. Further complainant your orator avers, that he is skilled in the work of his said employment, which skill he has gained by many years of experience therein and that on account of the special nature and character of his duties as cook aforesaid, and by reason of the many years of his life devoted to familiarizing himself with the special duties and services incident to such position and employment, he has in a large measure unfitted himself to take up any new branch of work, and that the character of said employment is such that unless the employers from whom he may seek employment do in fact employ a large number of workers, and particularly are engaged in the business of a restaurant, that all the skill and competence now possessed by complainant in the performance of his duties as restaurant cook will be of a little aid or assistance to him in obtaining employment in other lines of work, and to a large extent will be a detriment and disadvantage to him rather than a help in gaining other employment.

8. That by reason of the premises your orator will be in a substantial manner deprived of his right to contract for the sale of his labor as a cook upon the same terms as are permitted

to others who are native-born citizens, or qualified electors within the meaning of said pretended law; and his right to engage freely in said avocation without unjust or illegal discrimination will be taken from him ^l and that he will by the threatened act of said defendant Truax, if consummated, and by reason of the effect such law will have in coercing other employers of the kind of labor performed by him not to employ complainant in his said occupation, and complainant by reason of the premises will suffer irreparable injury and damage, and that the amount of damages are now and will be incapable of any exact determination.

9. Further complaining your orator avers, that the said pretended law is unconstitutional, null and void, because the same is repugnant to the fourteenth amendment to the constitution of the United States, and repugnant more particularly to that clause of said amendment which provides, that no state shall deprive any person of life, liberty or property without due process of law, and particularly to that clause of said amendment which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws; that said pretended law is repugnant to and in violation of the provisions of Section 1979 of the Revised Statutes of the United States, in that it pretends to justify the said defendant Traux, and does colorably warrant the said defendant Truax, in depriving this complainant of the right, privilege and immunity secured to him by the constitution and laws of the United States, to wit: the right, privilege and immunity, without discrimination as an alien, to be employed in the lawful employment of which he is now threatened to be deprived by said defendant Truax. Said pretended law is further repugnant to the fourteenth amendment of the constitution of the United States in that it is in letter and spirit calculated to deprive and will deprive this complainant and all others in like situation with him of the right freely to contract for the sale of their said labor, of the right to certain employment and of the right to life, and liberty within the meaning of said fourteenth amendment.

10. Complainant avers, that this suit is authorized by law to be brought by him to redress his deprivation, under the color

of a law and statute of a state, of the right, privilege and immunity secured to him by the constitution of the United States, and by the laws of the United States within the meaning of Subdivision 14 of Section 24 of an Act of Congress of March 3, 1911, being an act to codify, modify and amend the laws relating to the judiciary.

11. Your complainant further avers, upon information and belief, that there are many persons residing in the state of Arizona who are neither native-born citizens, nor qualified electors within the meaning of said pretended law, who will, if said law be enforced, lose their employment by reason thereof, and that the question to be determined herein is one of common and general interest to the many persons constituting such class, being the class hereinabove mentioned, to which complainant belongs and who are so numerous as to make it impracticable to bring them all before the court, for which reason this complainant sues for all such persons in like situation with himself, as aforesaid pursuant to Equity Rule 38 of the United States supreme court.

12. Further complaining your orator avers that the said Wiley E. Jones, attorney general of said state, and the said W. G. Gilmore, county attorney of Cochise county, will, unless restrained from so doing by an order of this honorable court, institute proceedings in the courts of the state of Arizona to enforce said pretended law, and the said W. G. Gilmore will and must institute proceedings in the superior court of the county of Cochise, state of Arizona, against said defendant Truax, in the event of the violation of said law by said Truax, and that under the laws of said state it is made the positive duty of said officers to prosecute to judgment and conviction said defendant Truax, in the event of a violation of said law, and in the event that he refuses to comply with said pretended law, and that by reason of the fear of said defendant Truax that he will be so prosecuted, said defendant Truax rather than to incur said penalties will discharge complainant from his said employment, under color of said law and statute.

In consideration whereof and forasmuch as complainant has no adequate remedy at law and can only have relief in a

court of equity, where such matters are peculiarly cognizable, he prays:

First. That the aforesaid statute of the state of Arizona, enacted and to be proclaimed as aforesaid and hereinbefore set out, he declared to be in violation of and in contravention of the rights of this complainant and the persons for whom he sues under the fourteenth amendment to the constitution of the United States.

Second. That the defendant Truax be temporarily and permanently enjoined from in any way or manner, by reason of the apparent force of said law, discharging this complainant from his service, and from carrying out his intention and threat so to do, already made as in this bill alleged.

Third. That the said Wiley Jones, attorney general, and the said W. G. Gilmore, county attorney of Cochise county, their, and each of their successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against said defendant Truax or attempting to enforce, the provisions of the aforesaid statute, or any part thereof, and from instituting or causing to be instituted any suit, prosecution or proceeding to enforce, as against said defendant Truax, the aforesaid statute, or any of the provisions thereof.

Fourth. That a temporary restraining order be granted before the hearing and determination of the application herein made for an interlocutory injunction, because of the fact as alleged herein that irreparable loss and damage would result to this complainant unless such temporary restraining order be granted.

Fifth. That complainant have such other and further relief as is just and equitable, as well as a decree for costs.

Sixth. And may it please your honors to grant unto complainant a writ of subpoena of the United States of America, issued out of and under the seal of this honorable court, directed to the said William Truax, Sr., Wiley Jones, attorney general aforesaid, and W. G. Gilmore, county attorney aforesaid, therein to be named and under a certain penalty to be and appear before this honorable court, then and there to answer, but not under oath (the answer under oath being expressly waived)

all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises, and complainant will ever pray, etc.

WILLIAMS & FLANIGAN,
Solicitors for Complainant.

STATE OF ARIZONA,
County of Cochise, ss:

I, Mike Riach, upon oath says: I am the complainant in the above entitled bill and am familiar with the matter and things mentioned in said bill, which I have read; and I know the contents thereof and the same are true upon information and belief and as to those matters I believe them to be true.

MIKE RAICH.

[Endorsements:]

2. Return, with affidavit of service.

3. Notice.

To William Truax, Sr., Wiley E. Jones, Attorney General of the State of Arizona, and W. G. Gilmore, County Attorney of Cochise County, and to Hon. G. W. P. Hunt, Governor of Arizona.

You, and each of you, will take notice that the plaintiff herein, by his attorneys, will make application to the honorable judge of the district court of the United States in and for the district of Arizona, sitting at Tucson, Arizona, on the 31st day of December, 1914, at the court house, in the city of Tucson, Arizona at 9:30 a. m. on said day for an interlocutory injunction herein restraining the defendants above named, and each of them from in any manner enforcing, or attempting to enforce, the provisions of a certain act initiated by the people of Arizona under the provisions of Section one of Article four of the constitution of the state of Arizona, entitled, "An act to protect the citizens of the United States in their employment against noncitizens of the United States in Arizona, and to provide penalties and punishments for the violation thereof," which initiated measure was, at an election held in said state on the 3d day of November, 1914, adopted by the qualified voters of said state, and subsequently on the fourteenth day of December,

1914, proclaimed by the governor of the state of Arizona as law, and according to the Bill of Complaint herein a copy of which was heretofore served upon you.

And that at the same time and place and pending the hearing and determination of said application for an interlocutory injunction, the plaintiff will ask that a temporary restraining order issue herein under the provisions of Section 266 of the Judicial Code of the United States.

Dated at Tucson, Arizona, this 23d of December, 1914.

WILLIAMS & FLANNAGAN,

JOHN H. CAMPBELL,

Attorneys for Plaintiff.

4. Return and oath, and notice to various individual parties.
5. Affidavit setting out irreparable damage and injury unless temporary restraining order awarded.
6. Order. * * *

This cause coming on regularly to be heard upon the application of Mike Raich, the complainant herein, for a temporary restraining order, by his solicitors, Williams and Flannigan and John H. Campbell, and the appearance of the defendant Truax herein having been entered, and the attorney general, Wiley E. Jones, appearing in person, and by Leslie E. Hardy, Esq., assistant attorney general, and the defendant William G. Gilmore, appearing by the said Wiley E. Jones, Esq., William B. Cleary, Esq., also appearing as counsel herein, and due notice for hearing of said application having been served upon the defendants, and each of them, together with George W. P. Hunt, governor of the state of Arizona, and all parties being represented in court as aforesaid, upon argument of counsel had and the court being fully advised in the premises,

It is ordered, adjudged and decreed:

That a temporary restraining order issue out of this court directed to the defendants Wiley E. Jones, attorney general, and W. G. Gilmore, county attorney of Cochise county, their and each of their successors, assistants, deputies, agents and employees, restraining them and each of them from in any way or manner enforcing against the said defendant Truax,

or in attempting to enforce against said defendant Truax the provisions of that certain act initiated by the people of the state of Arizona under the provisions of Section one of Article four of the constitution of the state of Arizona, and thereafter at an election held on the third day of November, 1914, duly adopted by the people of Arizona, and thereafter, on the fourteenth day of December, 1914, declared by the governor of the state of Arizona the law, commonly known as "The Eighty Per Cent. Law," and entitled "An Act to Protect the Citizens of the United States in Their Employment Against Noncitizens of the United States, in Arizona, and to Provide Penalties and Punishments for the Violation Thereof," and the said Wiley E. Jones, attorney general, his successors, assistants, deputies, agents and employees, and the said W. G. Gilmore, county attorney for Cochise county, his successors, assistants, deputies, agents and employees, be and they are hereby, and until further order of this court, restrained and enjoined from in any way or manner whatsoever enforcing against the said defendant Truax, or in attempting in any manner to enforce, the provisions of the aforesaid statute, or any part thereof, and from instituting or causing to be instituted any suit, prosecution or proceeding to enforce as against the said defendant Truax, the provisions of the aforesaid statute, or any part thereof, or from further prosecuting or proceeding in any prosecution already instituted against the said William Truax, for violation of the provisions of said law, or any part thereof.

Done in open court at Tucson, Arizona, this thirty-first day of December, 1914.

WM. H. SAWTELLE, *Judge.*

7. Stipulation.

It is hereby stipulated by and between the solicitors for plaintiff and defendants, that the application for an interlocutory injunction in the above entitled cause may be heard before the honorable judge of this district and such other judges as he may call to his assistance, as provided by Section 266 of the Judicial Code of the United States without this district, and in the state of California, on the fifth day of January, 1915, or as soon thereafter as said motion for an interlocutory injunction can be heard.

[Date and signatures.]

8. Motion to dismiss.

Come now the defendants and by their solicitors move this honorable court to dismiss the Bill of Complaint filed herein, for that:

I.

The suit is in truth and effect one against the state of Arizona, without its consent to be sued.

II.

The suit seeks to enjoin the enforcement of a criminal statute of the state of Arizona, contrary to the powers of a court of equity.

III.

Plaintiff's Bill of Complaint does not state facts sufficient to constitute a cause of action in equity.

IV.

It appears from the face of plaintiff's bill, that there is an improper joinder of parties, and that plaintiff is not entitled to sue in his behalf for the relief prayed for in his bill of complaint.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed and that he take nothing by his cause of action, and for such other relief as to this court seems just and equitable in the premises;

And for their costs and disbursements in this behalf expended.

[Signatures.]

9. Order.

This cause coming on regularly to be heard before the Honorable William W. Morrow, a circuit judge of the ninth circuit of the United States, and Honorable William C. Van Fleet, district judge of the northern district of California, and Honorable William H. Sawtelle, district judge of the district of Arizona, sitting as the district court of Arizona, under the provisions of Section 266 of the Judicial Code of the United States, at the court room of the circuit court of appeals of the ninth circuit of the United States in the city of San Francisco,

state of California, all parties to the record herein having entered their stipulation that said hearing be had in said state of California, and without the district of Arizona, upon the application of Mike Raich, the complainant herein, by his solicitors, Williams and Flannigan and John H. Campbell, Esquire, for an interlocutory injunction herein, and the defendant Truax appearing by Pillsbury, Madison and Sutro, his solicitors, and Wiley E. Jones, attorney general of the state of Arizona, appearing in person and by Leslie E. Hardy, Esquire, assistant attorney general of the state of Arizona, and the defendant William G. Gilmore appearing by the said Wiley E. Jones, Esq., and William B. Cleary, Esq., also appearing as counsel herein, and due notice of hearing of said application having been served upon the defendants, and each of them, together with George W. P. Hunt, governor of the state of Arizona, and all parties being represented in court as aforesaid, upon argument of counsel had and the court being fully advised in the premises,

It is ordered, adjudged and decreed:

That an interlocutory injunction issue out of this court directed to the defendants Wiley E. Jones, attorney general, and W. G. Gilmore, county attorney of Cochise county, their and each of their successors, assistants, deputies, agents and employees, restraining them and each of them from in any way or manner enforcing against said defendant Truax, or in attempting to enforce against the said defendant Truax the provisions of that certain act initiated by the people of the state of Arizona under the provisions of Section one of Article four of the constitution of the state of Arizona, and thereafter, at an election held on the third day of November, 1914, duly adopted by the people of Arizona, and thereafter, on the fourteenth day of December, 1914, declared by the governor of the state of Arizona the law, commonly known as the "Eighty Per Cent. Law," and entitled "An Act to Protect the Citizens of the United States in Their Employment Against Noncitizens of the United States, in Arizona, and to Provide Penalties and Punishments for the Violation Thereof," and the said Wiley E. Jones, attorney general, his successors, assistants, deputies, agents and employees, and the said W. G. Gilmore, county

attorney of Cochise county, his successors, assistants, deputies, agents and employees, be and they are hereby restrained and enjoined from in any way or manner whatsoever enforcing against the said defendant Truax, or in attempting in any manner to enforce, the provisions of the aforesaid statute, or any part thereof, and from instituting or causing to be instituted any suit, prosecution or proceeding to enforce as against the said defendant Truax, the provisions of the aforesaid statute, or any part thereof, or from further prosecuting or proceeding in any prosecution already instituted against the said William Truax, for violation of the provisions of said law, or any part thereof.

Done in open court at the city of San Francisco, California, this seventh day of January, 1915.

WM. W. MORROW,

*Judge of the United States Circuit Court
Of Appeals for the Ninth Circuit.*

WM. C. VAN FLEET,

*Judge of the United States District Court
for the Northern District of California.*

WM. H. SAWTELLE,

*Judge of the United States District Court
for the District of Arizona.*

10. Opinion, upon which order is based.

11. Petition for Appeal.

To the Honorable William H. Sawtelle, Judge of the United States District Court, for the District of Arizona:

The above named defendants, feeling aggrieved by the order rendered and entered in the above entitled cause on the 7th day of January, A. D., 1915, granting plaintiff's application for an interlocutory injunction, appeal therefrom to the supreme court of the United States, for the reasons set forth in the assignment of errors filed herewith. Defendants pray that this appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to the supreme court of the United States, sitting at

Washington in the District of Columbia, under the rules of that court in such cases made and provided.

WILEY E. JONES,
*Attorney general of the state of Arizona,
appearing in propria persona, and as
solicitor for the remaining defendants.*

12. Order Allowing Appeal.

On motion of Wiley E. Jones, Esquire, attorney general of the state of Arizona, appearing in *propria persona*, and as solicitor for the remaining defendants, it is hereby ordered that the appeal to the supreme court of the United States from the order granting plaintiff's application for an interlocutory injunction, heretofore filed and entered herein, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the supreme court of the United States.

Dated this 19th day of January, A. D., 1915.

WM. H. SAWTELLE,
Judge of the District Court.

13. Assignment of Errors.

Now come William Truax, Sr., Wiley E. Jones, attorney general of the state of Arizona, and W. G. Gilmore, county attorney of Cochise county, Arizona, defendants, and make and file the following assignment of errors, upon their appeal to the supreme court of the United states from the order of the district court of the United States, in and for the district of Arizona granting plaintiff's application for an interlocutory injunction.

The district court erred in granting the order for the interlocutory injunction in this case for the following reasons, to wit:

I.

That plaintiff's bill of complaint and the affidavits filed in the above entitled cause showed insufficient grounds for an interlocutory injunction.

II.

That the suit is, in truth and effect, one against the state of Arizona, contrary to public policy, and without its consent to be sued.

III.

That the suit seeks to enjoin the enforcement of a criminal statute of the state of Arizona, contrary to the powers of a court of equity.

IV.

That plaintiff's bill of complaint does not state facts sufficient to constitute a cause of action in equity.

V.

That it appears from the face of plaintiff's bill of complaint that plaintiff is not entitled to maintain his suit or to sue in his behalf for the relief prayed for in his bill of complaint.

VI.

That plaintiff's bill of complaint does not state facts sufficient to justify the relief granted, for the reason that the criminal statute complained of and the enforcement of which was enjoined, was the exercise of the police power of the state of Arizona, and not in contravention of the constitution and laws of the United States.

Wherefore, defendants pray that said order be reversed, and the district court of the United States, in and for the district of Arizona, be ordered to enter an order refusing plaintiff's application for an interlocutory injunction.

[Signatures of attorneys.]

14. Order for Clerk to Certify Papers, Documents, Etc., to the Supreme Court of the United States.

Defendants, having made application for an appeal to the supreme court of the United States from the order of this court granting plaintiff's application for an interlocutory injunction, and said appeal having been duly allowed by order of this court, now on motion of Wiley E. Jones, attorney general of the state of Arizona, appearing in *propria persona* and as solicitor for the remaining defendants.

It is ordered that the clerk prepare and certify a transcript of the record in this case upon defendants' said appeal, and

forward the same to the clerk of the supreme court of the United States.

Dated this 19th day of January, A. D., 1915.

WM. H. SAWTELLE,
Judge of the District Court.

15. Praeceptum for Transcript of Record on Appeal.

To George W. Lewis, Esquire, clerk of the United States district court, in and for the district of Arizona:

You will please, in accordance with the order and citation in the above entitled cause prepare a transcript of the record in this cause to be filed in the office of the clerk of the supreme court of the United States, and include in said transcript on appeal the following pleadings, proceedings and papers on file, to wit:

Bill of complaint;

Motion to dismiss;

Opinion of court on granting application for interlocutory injunction;

Petition for appeal;

Order allowing appeal;

Assignment of errors;

Citation on appeal and clerk's certificate;

Notice of application for temporary restraining order and interlocutory injunction;

Order granting temporary restraining order;

Order granting interlocutory injunction;

Stipulation providing for hearing of application for interlocutory injunction in the state of California;

Affidavit of John S. Williams, subscribed and sworn to the 31st day of December, 1914;

Praeceptum for transcript of record on appeal;

Order to certify transcript of record;

Affidavit of service of assignment of errors and citation on appeal.

Dated this 15th day of January, A. D., 1915.

WILEY E. JONES,
*Attorney General of the State of Arizona,
appearing in propria persona, and as
solicitor for the remaining defendants.*

16. Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Arizona, ss:

I, George W. Lewis, clerk of the United States district court for the district of Arizona, do hereby certify that the foregoing pages, number 1 to 57, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of Mike Raich, Plaintiff, vs. William Truax, Sr., et al., Defendants, No. E-9 (Tucson), as the same remain on file and of record in said district court, and I also annex and transmit the original citation, and affidavit of service of citation and assignment of errors, in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$69.20, and that same has been paid in full by the appellants, William Truax, Sr., Wily E. Jones, attorney general of the state of Arizona, and W. G. Gilmore, county attorney of Cochise county, Arizona.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States district court for the district of Arizona at Tucson, in said district, this 6th day of February, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and thirty-ninth.

GEORGE W. LEWIS,
Clerk United States District Court, District of Arizona.

By EFFIE D. BOTTS,
Deputy Clerk.

[Seal United States District Court, District of Arizona.]

17. Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Mike Riach, Plaintiff, and His Solicitors, Williams & Flannigan and John H. Campbell, Esquires, Greetings:

You are hereby cited and admonished to be and appear at the supreme court of the United States at Washington, District of Columbia, within sixty days from the date hereof, pursuant to an appeal filed in the clerk's office of the district court of the United States, in and for the district of Arizona, wherein

William Truax, Sr., Wiley E. Jones, attorney general of the state of Arizona, and W. G. Gilmore, county attorney of Cochise county, Arizona are defendants and you are plaintiff, to show cause, if any there be, why the error in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in their behalf.

Witness the Honorable William H. Sawtelle, United States district judge, for the district of Arizona, this 19th day of January, A. D., 1915.

WM. H. SAWTELLE,

United States Judge for the District of Arizona.

18. Affidavit of Service.

STATE OF ARIZONA,

County of Maricopa, ss:

Leslie C. Hardy first being duly sworn, upon his oath, deposes and says:

That he is an assistant attorney general of the state of Arizona and that, as such, on the 19th day of January, A. D., 1915, he caused to be mailed in an envelope properly addressed and stamped to John H. Campbell, Esquire, of counsel for the plaintiff in the above entitled cause of action, defendant's assignment of errors, together with citation on appeal to the supreme court of the United States in the above entitled cause.

Further affiant saith not.

LESLIE C. HARDY,

Subscribed and sworn to before me this 19th day of January, 1915.

WILLIE LOVETT,

Notary Public.

(24,612)

SUPREME COURT OF THE
UNITED STATES

October Term, 1914.

No. 868.

(See 240 U. S. 115.)

TYEE REALTY COMPANY, *Plaintiff in Error.*

vs.

CHARLES W. ANDERSON, *Collector of Internal Revenue.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

TRANSCRIPT OF THE RECORD.

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1. Writ of Error.

2. Clerk's Certificate.

3. Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to

appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Charles M. Hough, judge of the district court of the United States for the southern district of New York, at the city of New York, this 10th day of November in the year one thousand nine hundred and fourteen.

ALEX. GILCHRIST, JR., *Clerk.*

DAVIES, AUERBACH & CORNELL,

Plaintiff's Attorneys.

4. Return, with Affidavit.

5. Complaint.

The plaintiff Tyee Realty Company, by Davies, Auerbach & Cornell, its attorneys, complaining of the defendant, respectfully shows:

First. The plaintiff is a corporation duly organized and existing under and pursuant to the laws of the state of New York, having its principal place of business at No. 19 Cedar Street, in the borough of Manhattan, city of New York, in the southern district of New York, and in the second collection district of said state.

Second. The defendant is the Collector of Internal Revenue for the second collection district of the state of New York.

Third. The business for which the plaintiff was organized and the only business which the plaintiff has ever conducted is the holding for investment of real property in the state of New York. The plaintiff was incorporated on the 10th day of April, 1906, under the Business Corporations Law of the state of New York, with an authorized capital stock of \$10,000, all of which has been fully paid and duly issued. It purchased certain real property in the city of New York, subject to an indebtedness secured by mortgage, amounting to \$150,000, which was increased in 1908 to \$200,000 and in 1911 to \$275,000. On the 7th day of October, 1913, \$5,000 of this indebtedness was paid off, leaving the total indebtedness of the plaintiff outstanding on December 31, 1913, \$270,000.

The capitalization of the plaintiff mainly by means of mortgage indebtedness was in accordance with the public policy of the state of New York, as expressed in its Tax Laws, which

laws are so framed as to encourage in the case of realty corporations the capitalization of the enterprise by a large amount of mortgage bonds and a relatively small capital stock. The tax upon mortgage indebtedness is permitted to be paid and in the case of your petitioner has been wholly paid, once for all by means of a recording tax, at the rate of one-half of one per centum of the principal of the mortgage debt, in consideration of which the said debt and the bonds or other instruments representing the same are exempt from taxation so long as the mortgage or any extension thereof continues in force. The annual taxation upon this form of capitalization, therefore, may be taken to be equal to the legal interest upon the amount paid as a recording tax, or three-tenths of a mill upon each dollar of the principal debt. The annual tax upon capital stock required to be paid to the state comptroller is three-quarters of a mill upon each dollar of the capital stock.

The laws of New York are also so framed as to encourage in the formation of corporations such as the plaintiff a small nominal capital stock as compared with the actual value of the property used by the corporation, because the organization tax is proportioned to the par value of the capital stock and not to its actual value. Furthermore, the laws of New York in respect to the general property tax, which in the case of corporations is called a tax on capital stock and surplus, are so framed as to encourage and favor the method of capitalization adopted by the plaintiff, in that by such laws the plaintiff is authorized to deduct from the aggregate value of its property not only the assessed valuation of its real estate, but also the outstanding indebtedness secured by mortgage upon its real estate.

The above mentioned provisions of the laws of New York form part of a system of taxation deliberately adopted as the result of many years of experimentation and discussion, whereby direct taxes for state purposes have been practically eliminated and the jealousies, controversies and recriminations which formerly existed between different sections of the state, on account of alleged inequalities in respect to direct taxation, have been eliminated. In addition, by the system of taxation above referred to, the formation under the laws of New York

of corporations designed to do business in that state, as distinguished from the organization of such corporations under the laws of other states, has been promoted, the issuance by real estate corporations of large volumes of stock for speculative purposes has been discouraged and the interests of the people of the state of New York in respect to matters wholly within the jurisdiction and control of their state government have been safeguarded in many other ways according to the best judgment of those who have from time to time been charged with the duty of determining the legislative policy of the state.

Fourth. On or about the 21st day of May, 1914, under the alleged authority of Section 38 of the Act of Congress approved August 5, 1909, entitled "An Act to provide Revenue, Equalize Duties, Encourage the Industries of the United States and for other Purposes" and of Section 2 of the Act of Congress approved October 3, 1913, entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for Other Purposes," there was assessed upon the plaintiff by the commissioner of internal revenue a tax of seventy and 64-100 dollars (\$70.64), and thereafter notice of such assessment was duly given to the petitioner and a demand made upon the petitioner by the defendant for the payment of said tax on or before the 30th day of June, 1914, at the United States customs house building in the city of New York, in order to avoid penalty and interest. On or about the 15th day of July, 1914, a further notice and demand for payment of said tax was served upon the plaintiff by the defendant accompanied by a threat to distrain the property of the plaintiff if said tax was not paid within ten days. Thereafter and on or about the 21st day of July, 1914, the plaintiff paid to the defendant under protest and under duress, said sum of seventy and 64-100 dollars (\$70.64).

Fifth. Thereafter and on or about the 24th day of July, 1914, the plaintiff duly appealed to the Commissioner of Internal Revenue against the assessment and collection of said tax and demanded repayment of the amount so collected upon the ground that the said tax was erroneously and illegally assessed and collected for the reasons specified in its petition of appeal, and thereupon the said commissioner overruled and denied the said appeal in all respects.

Sixth. The tax collected by the defendant from the plaintiff, as above described, was erroneously and illegally assessed and collected particularly in the following respects:

(1) SECTION 2 of said Act of Congress approved October 3, 1913, is unconstitutional and void because it is not a due exercise of the taxing power conferred by the constitution upon congress, because it involves the taking of property without due process of law and the taking of property for public use without compensation and because the classifications, discriminations and inequalities contained in said act are arbitrary and have no reasonable relation to the production of revenue for the purposes of government, but are intended solely to regulate the conduct and affairs of the citizens and residents of the United States in respect to matters which are not within the powers delegated to congress by the constitution.

(2) SECTION 2 of the said act approved October 3, 1913, insofar as it purports to tax the plaintiff and other corporations similarly situated not upon their actual net income, but upon a fictitious net income created for the purpose of taxation only by the application of artificial rules of computation, is not designed for the production of revenue, but is designed to regulate the internal affairs of such corporations in respect to the plan or method of capitalization, and it thus involves an arbitrary classification of the persons subject to the tax having no reasonable relation to any power conferred upon congress by the constitution. In respect to the application of the above-mentioned provisions of Section 2 to the affairs of the plaintiff, it is respectfully shown:

(a) The plaintiff paid in the year 1913 as interest upon its mortgaged debt the sum of \$13,750.00. The actual net income of the plaintiff for the year ending December 31, 1913, after deducting the interest actually paid upon its mortgage debt, its taxes and other expenses, was \$564.26, upon which the normal tax of one per cent. would amount to \$5.64. The tax actually exacted from the plaintiff under the terms of said Act of October 3, 1913, amounts to \$70.64, being about twelve and one-half times the tax to which the plaintiff would have been subject if it had adopted the method or plan of capitalization which it was the obvious intention of congress in enacting said Act of October 3, 1913, to make compulsory. The difference,

\$65.00, is in the nature of a penalty imposed upon the plaintiff for the year 1913 because its plan and method of capitalization were such as the laws of New York not only permit but actually favor and encourage. Moreover, this penalty is imposed by an *ex post facto* law, because the plaintiff could not anticipate prior to October 3, 1913, what the provisions of said act would be in regard to regulating the capitalization of corporations and the greater part of said tax and penalty is imposed upon the plaintiff in respect to its supposed income prior to October 3, 1913.

(b) The actual value of the capital stock of the plaintiff for the year 1913 was assessed by the comptroller of the state of New York at \$57,300 and the plaintiff was taxed thereon accordingly. Had the nominal par value of the plaintiff's capital stock been equal to its actual value in said year, as so assessed, it would have been entitled in the computation of its taxable income to a deduction on account of interest amounting to \$9,615 instead of the deduction of \$7,250, which was all that was allowed to it under the terms of said Act of October 3, 1913, exacted from the plaintiff and the tax would have been only \$46.99, instead of \$70.64. The difference, \$23.65, is in the nature of a penalty imposed upon the plaintiff because the nominal or par value of its capital stock is less than the actual value, although such method of capitalization is not only permitted but actually encouraged by the laws of the state of New York, which state alone possesses the right to regulate the organization and capitalization of the plaintiff.

(3) SECTION 2 of the said Act approved October 3, 1913, is not based upon any census or an enumeration made as required by the constitution and is dependent for its validity upon the express authority given by the sixteenth amendment to the constitution of the United States in relation to the taxation of income as such. The tax assessed against the plaintiff as aforesaid did not purport to be based upon any income received or accrued after the approval of said act, but purported to be and in fact was based upon the amount shown by the return of the plaintiff as its net income for the entire year ending December 31, 1913, of which said net income a large amount actually accrued to and was received by the plaintiff prior to October 3, 1913. At the time of the assessment of said tax

there was no competent evidence before the commissioner of internal revenue that any income had accrued to or had been received by the plaintiff on or subsequent to October 3, 1913.

Wherefore, the plaintiff demands judgment against the defendant in the sum of seventy and 64-100 dollars (\$70.64), with interest from the 21st day of July, 1914, and the costs of this action.

DAVIES, AUERBACH & CORNELL,
Attorneys for Plaintiff.

6. Oath of President of Plaintiff Company.

7. Demurrer to Complaint.

The defendant demurs to the complaint herein on the ground that, as appears upon the face thereof, it does not state facts sufficient to constitute a cause of action.

8. City of New York, County of New York, State of New York, ss:

Ben A. Matthews, being duly sworn, deposes and says that he is an assistant United States attorney for the southern district of New York and as such has charge of the above-entitled case; that the above demurrer is not interposed for the purpose of delay, and that he verily believes that the complaint herein is bad in law.

BEN A. MATTHEWS.

[SEAL.]

9. Notice of Motion for Judgment.

SIR: Please take notice that on the complaint in the above entitled action and the demurrer interposed thereto, the undersigned will move this court at a stated term thereof, for the hearing of motions on the 11th day of February, 1915, at 10:30 o'clock in the forenoon of said day at the post office building, borough of Manhattan, city of New York, or as soon thereafter as counsel can be heard for judgment upon the pleadings herein and for such other and further relief as to the court may seem just and proper.

Yours, etc.,

DAVIES, AUERBACH & CORNELL,
Attorneys for the Plaintiff.

34 Nassau Street, New York City.

To. H. Snowden Marshall, Esq., United States district attorney and attorney for the defendant, post office building, borough of Manhattan, New York City.

10. Order Sustaining Demurrer.

This cause having come on before me upon demurrer filed by the defendant to the complaint herein, and after hearing Ben A. Matthews, assistant United States attorney, in support of said demurrer, and Brainard Tolles in opposition thereto, and after due deliberation;

Now, upon motion of H. Snowden Marshall, United States attorney, to sustain the demurrer and dismiss the complaint herein upon the ground that Section 2 of the Act of Congress approved October 3, 1913, is in all respects constitutional and valid, it is

Ordered that the said demurrer be and the same hereby is in all respects sustained; and it is

Further ordered that the complaint herein be and the same hereby is dismissed; and it is

Further ordered that judgment on the merits be entered for defendant with costs.

J. M. MAYER,

U. S. District Judge.

Notice of settlement waived.

Consented to as to form.

DAVIES, AUERBACH & CORNELL,

Attorneys for Plaintiff.

11. Judgment.

This cause having come on for hearing before the Honorable Julius M. Mayer, district judge, upon the demurrer filed by the defendant to the complaint herein at a stated term held on the 11th day of February, 1915, and Ben A. Matthews, Esq., assistant United States attorney, appearing in support of said demurrer, and Brainard Tolles, Esq., in opposition thereto; and due deliberation having been had thereon and an order having been entered on the 15th day of February, 1915, wherein it was ordered that the complaint be dismissed with costs, and the

costs having been taxed at the sum of eighteen and 70-100 dollars;

Now on motion of H. Snowden Marshall, Esq., United States attorney for the southern district of New York, attorney for defendant, it is adjudged that the defendant, Charles W. Anderson, herein, have judgment against the plaintiff, Tyee Realty Company, on the merits and that the defendant recover of the plaintiff the sum of eighteen and 70-100 dollars; and that defendant have execution therefor.

Judgment signed this 18th day of February, 1915.

ALEX. GILCHRIST, JR.,
Clerk U. S. District Court.

12. Petition for Writ of Error.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Tyee Realty Company, the plaintiff herein, respectfully shows that on or about the 18th day of February, A. D., 1915, judgment was duly entered in this court in this cause in favor of the defendant and against the plaintiff dismissing the complaint, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the supreme court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the supreme court of the United States.

DAVIES, AUERBACH & CORNELL,
Attorneys for Plaintiff.

13. Order Allowing Writ of Error.

This 24th day of February, A. D., 1915, comes the plaintiff, by its attorney, and files herein and presents to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may

be sent to the supreme court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff's giving bond according to law in the sum of \$250, which shall operate as a supersedeas bond.

J. M. MAYER, *D. J.*

14. Assignment of Errors.

Now comes the plaintiff, Tyee Realty Company, and assigns errors in the trial and decision of this cause as follows:

First. That court erred in sustaining the demurrer of the defendant to the complaint herein.

Second. The court erred in holding that the complaint herein did not state facts sufficient to constitute a cause of action.

Third. The court erred in holding that Section 2 of the Act of Congress approved October 3d, 1913, entitled "An act to reduce tariff duties and to provide revenue for the government and for other purposes" is in all respects constitutional and valid.

Fourth. The court erred in holding that Section 2 of said Act of Congress approved October 3, 1913, is an exercise of the power conferred upon congress by the sixteenth amendment to the constitution to tax incomes from whatever source derived.

Fifth. The court erred in holding that Section 2 of the said Act approved October 3, 1913, insofar as it purports to tax this plaintiff and other corporations similarly situated not upon their actual net income, but upon a fictitious net income created for the purpose of taxation only by the application of artificial rules of computation, is constitutional and valid.

Sixth. The court erred in holding that Section 2 of the said Act approved October 3, 1913, insofar as it attempts to regulate the internal affairs of corporations organized under the laws of the several states in respect to their plan or method of capitalization, is constitutional and valid.

Seventh. The court erred in holding that Section 2 of the said Act approved October 3, 1913, insofar as it imposes a penalty through disproportionate taxation upon this plaintiff because the nominal or face value of its capital stock is small in proportion to its mortgage debt, is constitutional and valid.

Eighth. The court erred in holding that Section 2 of the said Act approved October 3, 1913, insofar as it imposes a penalty upon this plaintiff through disproportionate taxation because the nominal or face value of its capital stock is small compared with the real value of its net assets, is constitutional and valid.

Ninth. The court erred in holding that Section 2 of said Act approved October 3, 1913, insofar as it purports to tax the income of the plaintiff received and expended or merged in the general assets of the plaintiff prior to the passage of said act, is constitutional and valid.

Tenth. The court erred in dismissing the complaint and in directing judgment in favor of the defendant upon the merits with costs.

Wherefore, plaintiff prays that the judgment of the said district court may be reversed.

DAVIES, AUERBACH & CORNELL,
Attorneys for Plaintiff.

15. Bond.

15a. Approved by:

C. M. Hough, United States district judge.

16. Justification by Surety Company.

17. Citation.

18. Stipulation as to Record.

It is hereby stipulated and agreed that the record on appeal in the above entitled action to the supreme court of the United States shall consist of the following papers, to wit:

Summons

Affidavit of service of summons

Complaint

Demurrer to complaint

Notice of motion for judgment

Order sustaining demurrer

Judgment

Petition for writ of error

Assignment of errors

Bond on appeal
 Order allowing writ of error
 Writ of error
 Citation

and may be so certified by the clerk of the United States district court for this district.

Dated March 2, 1915.

DAVIES, AUERBACH & CORNELL,
Attorneys for Plaintiff.
 H. SNOWDEN MARSHALL,
U. S. Attorney,
Attorney for Defendant.

(24,176)

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 1025.

(See 239 U. S. 614; 211 Fed. 254; 206 Fed. 222.)

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner,*

vs.

MARY A. MEESE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

TRANSCRIPT OF THE RECORD.

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1. [Complaint.]

In the District Court of the United States for the Western District of Washington, Northern Division.

MARY A. MEESE, MAY MEESE, EDITH MEESE, ANNA MEESE, ALFRED MEESE, a minor, CATHERIN MEESE, a minor, LIZZIE MEESE, a minor, WILLIE MEESE, a minor, BENNIE MEESE, a minor, by their Guardian ad Litem, MARY A. MEESE, *Plaintiffs*,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Defendant*.

Plaintiffs herein complaining of the defendant company say:

I.

That on the 12th day of April, 1913, Benjamin Meese, deceased, received injuries through the carelessness and negligence of the defendant company and from said injuries the said Benjamin Meese died on the morning of the 17th day of April, 1913, in the city of Seattle, King county, Washington.

That the deceased, Benjamin Meese, left surviving him, his wife, plaintiff herein, Mary A. Meese; and also eight (8) children, also plaintiffs herein, to wit:

May Meese, of the age of twenty-two (22) years,
Edith Meese, of the age of twenty (20) years,
Annie Meese, of the age of eighteen (18) years,
Alfred Meese, of the age of sixteen (16) years,
Catherin Meese, of the age of thirteen (13) years,
Lizzie Meese, of the age of twelve (12) years,
Willie Meese, of the age of nine (9) years,
Bennie Meese, of the age of six (6) years.

That all of said plaintiffs are citizens of the state of Washington, [2] residing in Seattle, King county, Washington.

That on the 29th day of May, 1913, Mary A. Meese was appointed by this honorable court guardian *ad litem* of the above-named minor children for the purpose of commencing and prosecuting their action against the Northern Pacific Railway Company, defendant herein, jointly with the surviving wife and other surviving children of Benjamin Meese.

That the Northern Pacific Railway Company is at this time, and was at all the times herein mentioned, a corporation organized and existing under the laws of Wisconsin, owning and operating a railway system carrying freight for hire in the state of Washington and at the times and places hereinafter mentioned.

II.

On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the city of Seattle, King county, Washington; and as part of his duty under his employment with the said Brewing Company was to assist in loading beer upon the cars and also to place government stamps upon the barrels, half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said Brewing plant for said loading. That at the plant, the said defendant had a railroad track running alongside of the wire house and buildings containing the

finished products to be shipped by said Brewing Company, which said siding was connected with defendant company's switches, siding and main tracks; and the said defendant company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be [3] carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appliances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the wire house of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product, and at the same time of loading the said car the said Brewing Company employed workmen to place the necessary government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employee who placed the government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids and receptacles of the finished product [4] to fall upon the employees of the Brewing plant and injure them.

III.

That at the time of the accident herein complained of, the deceased husband and father was placing government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment with the Brewing Company, and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

IV.

That while the said deceased, Benjamin Meese, was so employed placing the government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1911, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company, by and through its switchman, locomotive engineer and employees carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded with tremendous force and momentum, knocking the car along the track causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the Brewing Company upon the said skids to fall upon the deceased, maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant company the said Benjamin Meese, deceased, [5] died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein.

V.

That immediately after the accident and injury to Benjamin Meese, deceased, plaintiffs herein employed a surgeon and doctor for the purpose of treating and caring for the deceased, and that the said doctor and surgeon attended the deceased during the several days he lived, performed operations, and that the

service so rendered are of the reasonable value of two hundred and fifty (\$250.00) dollars. That the plaintiffs herein removed the deceased during his illness to the hospital and incurred a liability there of forty and 53-100 (\$40.53) dollars. That the burial of the deceased caused the plaintiffs herein the sum of about four hundred and twenty-five (\$425.00) dollars.

VI.

That at the time of the accident herein complained of the deceased Benjamin Meese, was fifty-two (52) years of age, an able-bodied, strong and healthy person, earning and able to earn about ninety (\$90.00) dollars per month, living with and supporting his family, consisting of himself and the parties plaintiff herein. That he was a loved and loving husband and father, devoting his services, attention and care upon his family, educating his minor children, rearing them in culture and giving them intellectual, moral and physical training as becomes a father. That the plaintiffs herein are damaged through the wrongful death of their husband and father, through the negligence and carelessness of the defendant company in the sum of twenty-five thousand seven hundred fifteen and 53-100 (\$25,715.53) dollars.

Wherefore, plaintiffs pray judgment against the [6] defendants in the sum of twenty-five thousand seven hundred fifteen and 53-100 (\$25,715.53) dollars, together with their costs and disbursements herein.

TEATS, TEATS & TEATS,
Attorneys for Plaintiff.

2. Demurrer.

Comes now the defendant Northern Pacific Railway Company, a corporation, and entering its appearance herein, demurs to the complaint of the plaintiffs, and for grounds of demurrer states:

I.

That the plaintiffs' complaint fails to state facts sufficient to constitute a cause of action against the defendant for the reason:

a. That there is no sufficient statement of facts set forth in said complaint to show that the accident referred to therein

was the result of negligence or want of care on the part of the defendant.

b. That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of Chapter 74 of the Session Laws of the state of Washington for 1911, being an act relating to compensation of injured workmen.

II.

That the court has no jurisdiction of the subject-matter of this action, the injuries to the plaintiffs' decedent having occurred while he was employed at the works and plant of his employer, and all rights of action by reason of the matters set forth in the plaintiffs' complaint have been withdrawn from the jurisdiction of the court by Chapter 74 of the Session Laws of Washington for 1911 known as the Workmen's Compensation Act.

III.

That there is a defect of parties plaintiff.

C. H. WINDERS,
Attorney for Defendant.

3. Order Sustaining Demurrer and Judgment of Dismissal.

BE IT REMEMBERED that this cause came on duly and regularly for hearing before the court on the 7th day of July, 1913, upon the demurrer of the defendant to the plaintiffs' complaint, plaintiffs appearing by their attorneys Messrs. Teats, Teats & Teats and the defendant by its attorney, C. H. Winders, and the matter being duly and regularly submitted to the court by both parties and the court having taken the cause under advisement and having thereafter filed herein his written opinion sustaining said demurrer, which said opinion was filed on July 10, 1913, and the defendant now moving for an order sustaining said demurrer it is by the court ordered, adjudged and decreed that the defendant's demurrer to the plaintiffs' complaint be and the same is hereby sustained.

And the plaintiffs in open court, through their attorney, electing to stand upon their complaint without amendment, it is now upon motion of the defendant ordered, adjudged and decreed that the plaintiffs take nothing by their alleged cause of action herein, and that this action be and the same is hereby dismissed, and that the defendant do have and recover of and from the plaintiffs its costs and disbursements herein to be taxed, to all of which the plaintiffs except and an exception is allowed.

Done in open court this 11th day of July, 1913.

EDWARD E. CUSHMAN, *Judge.*

4. Assignment of Errors.

In the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above plaintiffs in error by their attorneys Teats, Teats and Teats, and say that in the record and proceedings in the court below in the above-entitled action therein, there is substantial error in this: First, that the court erred in sustaining the demurrer of the defendant therein to the complaint of the plaintiffs therein, for the reason that said complaint states a complete cause of action against the defendant therein. Second, that the court erred in rendering judgment therein in dismissing the plaintiffs' action therein, for the reason that the said judgment was contrary to law.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

5. Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian *ad litem*, Mary A. Meese, plaintiffs in error, and petitions this honorable court to allow a writ of error to be directed to the district court of the United States for the district of Washington, northern division, to remove to this, the United States circuit court of appeals for the ninth circuit for a review thereof, the record in the case lately pending in said court below, wherein above-named plaintiffs in error were

plaintiffs and the above-named defendants in error was defendant, and particularly the record of the judgment rendered by said district court in the said cause wherein the said court below sustained the demurrer of the defendant to the complaint of the plaintiffs and dismissed the said plaintiffs said cause at their costs; said judgment was duly entered on record therein on the 11th day of July, 1913; that plaintiffs be allowed to perfect this appeal on filing an appeal bond in the sum of two hundred dollars.

Your petitioners respectfully state that they have this day filed herewith their assignment of errors committed by the court below in said cause, and intended to be urged by your petitioners and plaintiffs in error in the prosecution of this their suit in error.

Dated July 11, 1913.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

6. Order Allowing Writ of Error.

Upon a petition of the plaintiffs herein, they having filed their assignments of error, it is ordered that a writ of error be, and is hereby allowed, to have reviewed in the United States circuit court of appeals ninth circuit, the judgment heretofore entered herein, upon the plaintiffs in error filing their cost bond in the sum of two hundred dollars.

EDWARD E. CUSHMAN,
United States District Judge.

7. Appeal Bond and Approval.

8. [Opinion.]

9. Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America to the Honorable,
the Judge of the District Court of the United States for
the Western District of Washington, Northern Division,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of dismissal which is in the said district

court before you, or some of you between Mary A. Meese. May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian *ad litem*, Mary A. Meese, plaintiffs in error, and Northern Pacific Railway Company, a corporation, defendant in error, a manifest error hath happened to the damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, in said circuit, on the 13th day of August, 1913; and that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, chief justice of the supreme court of the United States, this 14th day of July, 1913.

[SEAL]

FRANK L. CROSBY,

Clerk of the District Court of the United States District Court,
for the Western District of Washington.

Allowed by

[SEAL]

EDWARD E. CUSHMAN,

District Judge of the United States, Presiding in the District
Court of the United States, for the Western District of
Washington, Northern Division.

10. Citation.

11. Praecipe.

To the Clerk:

Please make and prepare the record for the circuit court of appeals in the above-entitled action, to wit: Complaint, demurrer, order sustaining demurrer and judgment dismissing case,

assignment of error, petition for writ of error, order allowing writ of error, appeal bond, opinion of court.

TEATS, TEATS and TEATS.

12. Certificate of Clerk of District Court.

13. Writ of Error.

14. Citation.

15. Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

16. At a stated term, to wit, the September term A. D. 1913, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city of Seattle, in the state of Washington, on Monday, the eighth day of September, in the year of our Lord one thousand nine hundred thirteen: Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2287.

MARY A. MEESE ET AL., *Plaintiffs in Error.*

VS.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, *Defendant in Error.*

ORDER OF SUBMISSION.

By consent of counsel for the respective parties thereto, ORDERED, above-entitled cause submitted to the court for consideration and decision, on briefs, without oral argument.

17. Order Directing Filing of Opinion and Filing and Recording of Judgment.

ORDERED, that the opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of the court in accordance with said opinion.

18. Opinion, U. S. Circuit Court of Appeals.

19. Judgment, U. S. Circuit Court of Appeals.

In error to the district court of the United States for the western district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the western district of Washington, northern division. duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be, and hereby is reversed, with costs in favor of the plaintiffs in error and against the defendant in error, and with directions to the said district court to overrule the demurrer.

It is further ordered and adjudged by this court, that the plaintiffs in error recover against the defendant in error for their costs herein expended, and have execution therefor.

20. Motion for Order Staying Mandate.

Comes now the defendant in error, Northern Pacific Railway Company, and moves this court for an order staying the mandate from issuing to the United States district court for the western district of Washington, northern division, pending the action of the supreme court of the United States upon the application of said defendant in error for a writ of *certiorari* to review the opinion and order entered thereon by this court in the above-entitled cause.

This motion is based upon the grounds that the defendant in error is now filing in the supreme court of the United States its application, in form as required by statute and the rules of said court, for a writ of *certiorari* to review the decision and judgment of this court entered herein on the 16th day of February, 1914; that the decision of this court involves the construction of the Workmen's Compensation Act of the state of Washington, and the defendant in error believes and contends that the questions involved are of such importance to the bar of the state of Washington and to its citizens as to require in the furtherance of justice and uniformity of decision the issuance of such writ; and in the opinion of its attorneys the construction as placed on such act by this court is contrary to

the intent of the legislature of said state and contrary to the construction placed thereon by its highest court of record.

That the time necessarily involved in obtaining a decision of the supreme court of the United States upon its application, by reason of the distance from San Francisco to the place of trial and the residence of the attorneys for the defendant in error, is such as to make it impossible for the defendant in error to obtain a ruling upon its application within the time prescribed by Rule 32 of this court for the issuance of mandate upon the judgment of this court.

This application is based on the grounds above enumerated, and upon the entire record herein and the affidavit attached hereto.

C. H. WINDERS.

Attorney for Defendant in Error, Northern Pacific Railway Company.

21. Affidavit.

United States of America,
State of Washington,
County of King,—ss.

C. H. Winders, being first duly sworn, deposes and says:

That he is attorney of record for the defendant in error; that on the 16th day of February, 1914, the above-entitled court made and entered its opinion and order reversing the decision and judgment entered in this cause by the United States district court for the western district of Washington northern division; that by its opinion this court construed what is known as the Workmen's Compensation Act of the state of Washington, placing thereon a construction different from that announced by the honorable district judge before whom this case was tried; that the defendant in error, believing that the court was in error in adopting the construction as set forth in its opinion, and further believing that the construction of the statute in question is one of public importance, has decided to apply to the supreme court of the United States for a writ of *certiorari*, asking such court to review the opinion and decision of this court, and for such purpose affiant, on behalf of said defendant in error, has obtained, or is now obtaining, from the clerk of

this court a certified copy of the entire record in this case, and is preparing a petition in conformity to the rules of the supreme court of the United States, and will, as soon as such certified copy of the record herein has been received, file said petition in the supreme court of the United States, asking such court to issue a writ of *certiorari* to the above-entitled court for the purpose of reviewing, as aforesaid, its judgment and decision; that affiant believes that the importance of the questions involved in the opinion of this court, growing out of the construction of the Compensation Act of the state of Washington, is such as to make it to the interest of the bar of the state of Washington as a whole to have the questions involved passed upon by the supreme court of the United States; and affiant further states that the construction given by this court to the statute referred to is not the construction which has been given by some of the superior courts of the state of Washington, and, in affiant's opinion, is contrary to the interpretation placed upon said statute by the supreme court of the state of Washington; that by reason of the location of the attorneys for the defendant in error it will be impossible to file a petition for a writ of *certiorari* in the supreme court of the United States and have a ruling thereon prior to the time provided for by Rule 32 of this court for the issuance of mandate, but that due diligence is being and will be used in the filing of said petition and the obtaining of a ruling of the supreme court of the United States thereon.

C. H. WINDERS.

Subscribed and sworn to before me this 13th day of March, 1914.

[SEAL]

F. C. REAGAN,

*Notary Public in and for the State of Washington, residing
at Seattle.*

United States of America,
State of Washington,
County of King,—ss.

C. H. Winders, being first duly sworn, deposes and says:

That he is attorney for the defendant in error, and as such has prepared the foregoing motion for a stay of mandate, as stated in the preceding affidavit; that a petition for a writ of

certiorari is now being prepared and will be filed in the supreme court of the United States about the time of the presentation of said motion; that affiant and other of the attorneys for the defendant in error, and its general counsel, have fully considered the judgment of this court, and in good faith have arrived at the opinion that a writ of *certiorari* should be applied for, and that this application, in the opinion of affiant, is meritorious and is not in any way interposed for the purpose of delay.

C. H. WINDERS.

22. Notice [of Motion for Order Staying Mandate].

23. Order Staying Mandate.

The motion of the defendant in error, Northern Pacific Railway Company, for an order staying mandate upon the judgment of this court heretofore entered on the 16th day of February, 1914, coming on for hearing this day in chambers, and it appearing that the time for the issuance of mandate has not elapsed, and it further appearing that the defendant in error is about to file its petition in the supreme court of the United States for a writ of *certiorari* to review the decision and judgment of this court entered as aforesaid, and has ordered from the clerk of this court for such purpose a certified copy of the entire record of this cause, as required by the rules of the supreme court of the United States, and it appearing that it is proper, pending a decision of the supreme court of the United States upon the application of the defendant in error for a writ of *certiorari*, that the mandate upon the judgment of this court to the United States district court for the western district of Washington, northern division, be stayed, and that the questions involved in the judgment of this court are of such importance as to justify the filing of such application, and all of the premises being understood;

It is now ordered that the issuance of mandate upon the judgment of this court be and the same is hereby stayed, pending a decision of the supreme court of the United States upon the application of the defendant in error for a writ of *certiorari* to review the decision and judgment of this court entered herein on the 16th day of February, 1914.

Dated this 17th day of March, 1914.

WM. M. MORROW, *Judge*.

**24. Certificate of Clerk U. S. Circuit Court of Appeals to Record
Certified Under Section 3 of Rule 37 of the Rules of
the Supreme Court of the United States.**

25. Writ of Certiorari.

UNITED STATES OF AMERICA, ss:

[Seal of the supreme court of the United States.]

The President of the United States of America to the Honorable
the Judges of the United States Circuit Court of Appeals
for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit
in which Mary A. Meese, May Meese, Edith Meese, Anna Meese,
and Alfred Meese et al., minors, by their guardian *ad litem*,
Mary A. Meese, are plaintiffs in error, and Northern Pacific
Railway Company is defendant in error, which suit was removed
into the said circuit court of appeals by virtue of a writ of
error to the district court of the United States for the western
district of Washington, and we, being willing for certain reasons
that the said cause and the record and proceedings therein
should be certified by the said circuit court of appeals and
removed into the supreme court of the United States, Do hereby
command you that you send without delay to the said supreme
court, as aforesaid, the record and proceedings in said cause,
so that the said supreme court may act thereon as of right and
according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of
the United States, the twenty-ninth day of April, in the year
of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

26. Stipulation as to Record.

27. Return to Writ of Certiorari.

By direction of the honorable the judges of the United States
circuit court of appeals for the ninth circuit, I, Frank D.
Monckton, as clerk of said court, in obedience to the annexed
writ of *certiorari* issued out of the honorable the supreme court
of the United States and addressed to the honorable the judges

of the United States circuit court of appeals for the ninth circuit, commanding them to send, without delay, to the said supreme court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a "Stipulation As to Return to Writ of *Certiorari*," the original of which stipulation was filed in my office on the 7th day of May, A. D. 1914 and, pursuant thereto, do hereby send the same as the return to the said writ of *certiorari*.

In testimony Whereof, I have hereunto set my hand and affixed the seal of the said the United States circuit court of appeals for the ninth circuit, at the city of San Francisco, in the state of California, this 7th day of May, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.*

(24,702)

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 450.

(See 240 U. S. 227; 95 Kas. 261.)

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

TRANSCRIPT OF THE RECORD.

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1. After the Transcript of the Record in the County Court in Kansas, the Record proceeds:

On March 31, 1914, the plaintiff filed in the district court of Shawnee county, Kansas, first division, its petition, which, omitting the caption, signature of counsel, endorsements and filing marks, was as follows:

2. Petition.

Plaintiff for its cause of action, states that the defendant is the duly elected, qualified and acting secretary of state of the state of Kansas. That the plaintiff is now and for more than ten years last past has been a corporation duly organized and existing under and by virtue of the laws of the state of Kansas with an authorized capital stock of 600,000 shares of the par value of one hundred (\$100.00) dollars each, of which has been issued paid up and are now outstanding, 316,600 shares of one hundred (\$100.00) dollars each. That the plaintiff by its charter was and is authorized to own, construct, operate and maintain a railroad and railroads in the state of Kansas and in other states. That the plaintiff by and with the means derived from the issuing and sale of the said 316,600 shares of one hundred (\$100.00) dollars each of its capital stock has constructed and

acquired a line of railroad and railroads extending from Kansas City in the state of Missouri, south to and through the state of Kansas, and into and across the states of Oklahoma, Missouri, Arkansas and Tennessee, with all its necessary side tracks, turn-outs, stations, shops and terminal facilities necessary for the successful operation of said railroad system. That said railroad and each and every part thereof has been for more than ten years last past, and is now leased to the St. Louis & San Francisco Railroad Company, which company or the receivers who have been duly appointed for its railroads and property have during the period herein named, and are now operating said railroad system and each and every part thereof as common carriers of passengers and property for hire and engaged in interstate commerce between the several states hereinbefore named. That all of the said capital stock of the plaintiff so issued and outstanding is, and has been for more than ten years last past, invested in and used in acquiring said above described railroad line and lines extending into and through the above named states which have been during all the times aforesaid and now are being used in carrying on interstate commerce. That the defendant herein as secretary of state of the state of Kansas has demanded of the plaintiff herein, the payment to the said defendant of the sum of two thousand five hundred (\$2,500.00) dollars as a corporation tax or fee on all the capital stock of the plaintiff herein so issued and outstanding and invested as aforesaid. That the plaintiff herein, protesting that the said demand of the defendant for the payment of said sum as such corporation tax and fee was and is illegal and unauthorized, and that the plaintiff herein was under no legal obligation to pay said amount to the defendant, did, on the 31st day of March, A. D. 1914, pay to the said defendant, under protest and duress and against its will, said sum of two thousand five hundred (\$2,500.00) dollars, which sum was received by the defendant and is now retained by him.

Plaintiff alleges that said sum of money was demanded of it by the defendant, and was received from it by the defendant under the claim and pretense on the part of the defendant that the provisions of Chapter 135 of the Sessions Laws of the state of Kansas enacted by the legislature of said state at the session

of 1913, authorized and empowered the defendant to demand and receive of the plaintiff herein, said sum of money as a corporation tax and fee as aforesaid, and under the claim that the plaintiff herein was legally obligated under the provision of said Chapter 135 to pay the same, and that by the provisions of said law so enacted by the legislature of the state of Kansas, every corporation organized under the laws of the state of Kansas for profit, is required to pay to the secretary of state an annual fee upon the amount of its paid up capital stock, which amount is governed by the amount of such paid up capital stock, and by said law it is provided that when the paid up capital stock of a corporation organized under the laws of the state of Kansas exceeds \$5,000,000.00, the annual fee shall be \$2,500.00.

Plaintiff alleges that its paid up capital stock exceeds the sum of five million (\$5,000,000.00) dollars and equals the sum of thirty-one million six hundred thousand six hundred (\$31,600,600.00) dollars.

Plaintiff alleges that the said capital stock of this plaintiff is now and has been at all times during the last ten years invested in said line of railroad which extends into and across the several states above named, more than three-fourths of which property is situated outside of the state of Kansas, and more than three-fourths of said capital stock is now and was at all times above stated invested in and devoted to said business outside of the state of Kansas.

Plaintiff alleges that the provisions of said Chapter 135 of the Session Laws of the state of Kansas of 1913, are invalid and did not authorize the defendant to demand and receive of the plaintiff the aforesaid sum of money for the aforesaid purpose, and that the plaintiff herein was under no legal obligation to pay said sum for said purpose. That the provisions of said Chapter 135 of the Laws of 1913 are in conflict with and are repugnant to that provision of Section 10, of Article I, of the constitution of the United States, which provides that congress shall have power "To regulate commerce with foreign nations and among the several states and with the Indian tribes." That the congress of the United States has enacted laws regulating commerce between the several states and between the states above referred to into and through which the line of railroad of the plaintiff herein extends.

Plaintiff alleges that at the time the defendant demanded of this plaintiff the payment of said sum, and at the time he received the same, defendant well knew the same was illegal and that he had no lawful right to demand and receive the same. Plaintiff herein, under the fear that if the said law contained in said Chapter 135 of the Session Laws of 1913, should perchance be held valid, plaintiff would suffer the severe penalties prescribed in said law and have its charter revoked in case it did not pay said sum, and by reason of said demand, paid the same, protesting at the time that it was illegal and should not be exacted from plaintiff.

Plaintiff alleges that said Chapter 135 of the Session Laws of 1913 of the state of Kansas attempts to, and if enforced will impose a burden on interstate commerce, in that it exacts the payment of a fee and places a tax upon the capital stock of the plaintiff herein, which is now and at all times hereinbefore referred to was used and employed in carrying on commerce between the several states hereinbefore named, and if enforced would enable the state of Kansas and the defendant herein to levy and collect a tax from the plaintiff herein on its property situated outside of and beyond the limits of the state of Kansas, and which is used in carrying on interstate commerce and on its capital stock devoted to carrying on interstate commerce outside the state of Kansas.

Wherefore, plaintiff prays judgment against the defendant for the aforesaid sum of two thousand five hundred (\$2,500.00) dollars, with interest thereon at the rate of six per cent. per annum from the 31st day of March, 1914, together with the costs of this suit.

3. Thereafter, in due time, the defendant duly filed his demurrer to said petition, which demurrer, omitting caption, signature of counsel, endorsements and filing marks, was as follows:

4. Demurrer.

Now comes the defendant herein and demurs to the plaintiff's petition, for the reason that said petition does not state facts sufficient to constitute a cause of action.

Thereafter said demurrer was submitted to and was heard by the court below and was by the court sustained and judgment rendered thereon in said case as follows:

5. Journal Entry.

Now, in this ninth day of May, A. D., 1914, the above entitled action comes on for hearing upon the demurrer heretofore filed by said defendant to the petition of the plaintiff in this action, and the plaintiff appears by W. F. Evans, R. R. Vermilion and W. F. Lilleston, its attorneys; and the defendant appears by J. S. Dawson, W. P. Montgomery and F. P. Lindsay, his attorneys, and said demurrer is submitted to the court and the same taken under advisement; and on this sixteenth day of May, A. D., 1914, the court being fully advised in the premises, orders and adjudges that the said demurrer of the said defendant be and the same is hereby sustained, to which judgment and ruling the plaintiff excepts; whereupon the plaintiff declines to plead further and elects to stand upon its petition.

It is therefore considered, ordered and adjudged by the court that the plaintiff take nothing by this action and that the defendant have and recover of and from the plaintiff the costs of this action taxed at \$——, to which judgment plaintiff excepts.

6. Notice of appeal of this case by plaintiff to the supreme court of Kansas, was duly filed, and copy thereof served, service duly acknowledged and proved, proof filed and appeal perfected within due time.

7. And afterwards, on the 14th day of January, 1915, the same being one of the regular judicial days of the January term, 1915, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had, and remains of record in words and figures as follows, to wit:

8. Journal Entry of Substitution [of a succeeding Secretary of State].

9. Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of division

No. One, of the district court of Shawnee county; thereupon after oral argument by R. R. Vermilion for the appellant, and by S. M. Brewster, attorney general, for the appellee, said cause is submitted on brief of counsel for both parties, and taken under advisement by the court.

10. Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at \$——, and hereof let execution issue.

11. Be it further remembered, that on the same day, to wit: the 10th day of April, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's written opinion, together with the syllabus thereto, which opinion and syllabus are in words and figures as follows, to wit:

12. Syllabus by the Court.

MASON, *J.*:

A state may impose upon the franchise of corporate existence of a domestic corporation a tax measured by the amount of its capital stock, notwithstanding a large part of its business may consist of interstate commerce.

13. Statement.

This case, and others of a similar character, involve the validity of a statute requiring corporations to file annual reports and to pay certain annual fees. The provisions of the statute, so far as they are important to the decision of that question, follow: (Omitted here.)

14. Opinion.

15. Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, through S. M. Brewster, attorney general of the state of Kansas, and attorney of record for J. T. Botkin, secretary of state of the state of Kansas, defendant in error, and R. R.

Vermilion and W. F. Lilleston, attorneys for The Kansas City, Fort Scott & Memphis Railway Company, plaintiff in error, that the clerk of the supreme court of the state of Kansas, in preparing a transcript of the record in the above entitled case, to be transmitted to the supreme court of the United States, with the writ of error heretofore, on April 14, 1915, allowed and issued from the said supreme court of the United States, to the supreme court of the state of Kansas, in said case, may and shall incorporate in such transcript and transmit with said writ of error, the following portions of the record, which shall constitute the transcript of record on error herein, for the review of this case in the supreme court of the United States:

First The appellant's abstract of record complete, including petition, demurrer, journal entry of proceedings and judgment.

Second. This stipulation with endorsements and filing marks.

Third. Copy of the journal entry of submission of the case in the supreme court of Kansas.

Fourth. Copy of the opinion and of the final judgment made and entered in said case, in the supreme court of Kansas.

Fifth. The certificate of the clerk of the supreme court of Kansas that the foregoing is a full, true and complete transcript of the record and proceedings.

Sixth. 1. All papers and files in and concerning the proceedings in error for the review of this case by the supreme court of the United States, including copy of petition for writ of error, allowance, endorsements and filing marks; copy of assignment of errors, endorsements and filing marks; copy of order of chief justice granting petition for writ of error, endorsements and filing marks; copy of bond with approval endorsed, endorsements and filing marks, together with clerk's certificate of lodgment of the original bond in his office; original writ of error, allowance, endorsements and filing marks, together with clerk's certificate of lodgment of the same and of copy thereof for defendant in error in his office; original citation, endorsements and filing marks, together with acknowledgments of service and entry of appearance.

2. Return of writ of error, together with statement of costs.

Seventh. Order of revivor.

Eighth. Notice of appeal and proof of service.

The clerk will also index the record so to be transmitted.

It is stipulated and understood by and between the parties hereto that the above and foregoing portions of the record in this case are sufficient for the consideration of the questions to be reviewed in the supreme court of the United States and that the omitted portions are unnecessary to such consideration of said questions, and it is further stipulated and understood by and between the parties that the appeal of this case was properly taken to and perfected in the supreme court of the state of Kansas, and that on said appeal, the term of office of Charles H. Sessions, secretary of state of the state of Kansas, expired, and he was succeeded in office by the appellee, J. T. Botkin, the secretary of state of the state of Kansas, who was by order of revivor of the supreme court of Kansas, duly substituted as appellee in said case instead of said Charles H. Sessions, former secretary of state, and said action was duly revived against and in the name of said J. T. Botkin, secretary of state of the state of Kansas, as appellee, and that said appeal resulted in the final judgment and decision complained of by The Kansas City, Fort Scott & Memphis Railway Company, plaintiff in error, in said proceedings in error for the review of this case in and by the supreme court of the United States.

Dated this 20th day of April, 1915.

S. M. BREWSTER,

*Attorney General of the State of
Kansas, and Attorney of Record
for J. T. Botkin, Secretary of
State of the State of Kansas, De-
fendant in Error.*

R. R. VERMILION &

W. F. LILLISTON,

*Attorneys for The Kansas City,
Fort Scott & Memphis Railway
Company, Plaintiff in Error.*

16. In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
Appellant,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State of the State of Kansas, and Substituted by an Order of Revivor as Appellee in the Stead of the said Charles H. Sessions, Secretary of State, *Appellee.*

Petition for Writ of Error.

UNITED STATES OF AMERICA,
State of Kansas:

To the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, a corporation organized under the laws of the state of Kansas, respectfully shows that on the 10th day of April, 1915, the supreme court of the state of Kansas, in the above-entitled case pending in said court, wherein J. T. Botkin, secretary of state of the state of Kansas, was appellee and your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, was appellant, made and entered a final judgment and decision in favor of said appellee and against the appellant, your petitioner; that this case was originally brought by said appellant, as plaintiff, in the district court of Shawnee county, Kansas, against Charles H. Sessions, secretary of state of the state of Kansas, as defendant, who filed in said district court a general demurrer to said plaintiff's petition therein, which general demurrer was by the consideration and judgment of said district court sustained, and judgment was rendered by said district court that said demurrer be sustained and that the plaintiff in said court, your petitioner herein, take nothing by said action and that it pay the costs of said suit. That an appeal from the said judgment of said district court, to the supreme court of the state of Kansas, was duly taken and perfected by the plaintiff therein, this appellant, your petitioner,

and during the pendency of said suit and said appeal, in the said supreme court of the state of Kansas, the term of office of the said Charles H. Sessions, secretary of state of the state of Kansas, expired and he was succeeded in office by the appellee, J. T. Botkin, as secretary of state of the state of Kansas, who was by the order and judgment of the supreme court of the state of Kansas, duly substituted as appellee instead of the said Charles H. Sessions, former secretary of state, and said action was revived against and in the name of the said J. T. Botkin, secretary of state of the state of Kansas; that said final judgment and decision of the supreme court of the state of Kansas, in said case, affirmed said judgment of the district court of Shawnee county, Kansas, as will particularly appear from the record in this case. That in said final judgment and decision, as well as in the proceedings had prior thereto in said case, certain manifest errors were committed to the prejudice of your petitioner, which feels itself aggrieved by said final decision and judgment, all of which will more particularly appear from the assignment of errors filed with this petition. That said supreme court of the state of Kansas is the highest court of the state of Kansas in which a decision in said case and matter could be had, and is the highest court and the court of last resort in said state of Kansas.

That in said case and in the supreme court of the state of Kansas, your petitioner duly drew in question the validity of Chapter 135 of the Session Laws of the state of Kansas of 1913, the same being an act of the legislature of the state of Kansas entitled, "An Act to Require Corporations to File Annual Reports with the Secretary of State and to Pay Certain Annual Fees, and Repealing Section 1726 General Statutes of Kansas 1909." And your petitioner also duly and particularly drew in question the validity of said statute, in said case, insofar as it applied to corporations organized under the laws of the state of Kansas, whose capital stock was invested in railroads extending into and through the state of Kansas and other states, which was used in carrying on interstate commerce, and more particularly the provisions of said statute applying to corporations organized under the laws of the state of Kansas, whose capital stock was invested in property used in carrying on interstate commerce, on the ground that said statute and said pro-

visions, and each of them, were repugnant to that portion of Section 8 of Article I, of the constitution of the United States which provides that congress shall have power, "To regulate commerce with foreign nations and among the several states and with the Indian tribes," and on the ground that the same constituted an unconstitutional burden on interstate commerce, and on the ground that said law, and each of the provisions thereof, were repugnant to the fourteenth amendment to the constitution of the United States, and particularly to the provisions of Section 1 of Article XIV thereof. That said final decision and judgment of the supreme court of the state of Kansas was in favor of the validity and constitutionality of said statute of Kansas and the said provisions thereof with reference to corporations organized under the laws of the state of Kansas. That in said case and in the supreme court of the state of Kansas, your petitioner claimed that said statute and said provisions thereof, and each of them, constituted and constitute a burden on interstate commerce and an attempt to regulate commerce among the several states of the United States, and deprived your petitioner of liberty and property without due process of law and denied to your petitioner the equal protection of the laws, contrary to the fourteenth amendment to the constitution of the United States, and said final judgment and decision of the supreme court of the state of Kansas was against your petitioner's said claims, and each of them, and was against rights, privileges and immunities claimed by your petitioner in and throughout said case and in the supreme court of the state of Kansas, under Section 8 of Article I, of the constitution of the United States and under the fourteenth amendment to the constitution of the United States; all of which will more particularly appear from the record and proceedings in said case. Your petitioner further represents that said final decision and judgment of the supreme court of Kansas was and is erroneous and contrary to Section 8 of Article I of the constitution of the United States and the fourteenth amendment to the constitution of the United States and each of them.

Wherefore, your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, prays for the allowance of a writ of error from the supreme court of the United States to the

supreme court of the state of Kansas, and the judges thereof, to the end that the record in this case and matter may be removed into the supreme court of the United States, and each and all of the errors complained of by your petitioner, be examined and corrected and said judgment reversed; and for citation. stay and supersedeas, and for such other processes and relief as will enable your petitioner to obtain a review of this case in, and a correction of said errors, and each of them, by the supreme court of the United States, and your petitioner will ever pray.

THE KANSAS CITY, FORT SCOTT &
MEMPHIS RAILWAY COMPANY,

By R. R. VERMILION,

W. F. LILLISTON,

Attorneys for said Petitioner.

Allowed at Topeka, Kansas, this April 14, 1915.

W. A. JOHNSTON,

*Chief Justice of the Supreme Court
of the State of Kansas.*

17. Order Granting Petition for Writ of Error.

Now, on this 14th day of April, 1915, there are presented, in this case, to the Honorable W. A. Johnston, chief justice of the supreme court of the state of Kansas, at chambers, a petition filed herein for a writ of error and an assignment of errors filed herein and accompanying said petition, of and by the appellant, The Kansas City, Fort Scott & Memphis Railway Company, praying for the allowance of a writ of error from the supreme court of the United States, to the supreme court of the state of Kansas, to review the final judgment and decision of the supreme court of the state of Kansas heretofore rendered and made on April 10, 1915, in the above entitled case; and upon reading said petition for writ of error and said assignment of errors, and it appearing from said petition and assignment of errors and the record in the case, that a proper case for the granting of said petition and for the allowance of said writ of error is duly presented:

It is therefore ordered that the said petition for a writ of error be and it is hereby granted; that said writ of error be

and it is hereby allowed upon said appellant, The Kansas City, Fort Scott & Memphis Railway Company, giving a bond according to law, in the sum of \$500.00, with good and sufficient sureties, which said bond when approved shall operate as a supersedeas bond and stay of execution and of the mandate to the lower court.

W. A. JOHNSTON,
*Chief Justice of the Supreme Court
of the State of Kansas.*

18. Assignment of Errors.

Comes now The Kansas City, Fort Scott & Memphis Railway Company, the appellant named in the above entitled action, and files herein the following assignment of errors which it will present to the supreme court of the United States, and upon which it will rely in its prosecution of the writ of error issued or to be issued in this case, from the supreme court of the United States to the supreme court of Kansas, and it avers that the supreme court of the state of Kansas, being the highest court of law or equity of the state of Kansas in which a decision could be had in said suit, on the 10th day of April, 1915, rendered a final judgment in the above entitled action, which was duly entered of record, affirming the judgment of the district court of Shawnee county, Kansas, in favor of the defendant and against plaintiff, sustaining the general demurrer filed by the defendant in the district court of Shawnee county, Kansas, to the petition of the plaintiff; this appellant, and for costs, all as shown by the record in this case.

In the rendition of said judgment by said supreme court of the state of Kansas, the following adverse and manifest errors were committed by the supreme court of the state of Kansas, to the great damage and prejudice of this appellant, which are apparent on the face of the record, and for the purpose of having the same reviewed and said final judgment reversed and corrected in and by the supreme court of the United States, said appellant, The Kansas City, Fort Scott & Memphis Railway Company, makes the following assignment of errors:

1. The supreme court of the state of Kansas erred in rendering said final judgment affirming the judgment of the district court

of Shawnee county, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the district court of Shawnee county, Kansas, to the petition of the plaintiff, this appellant, and for costs.

2. The said supreme court of the state of Kansas erred in holding and adjudging that the judgment rendered against this appellant by the district court of Shawnee county, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the district court of Shawnee county, Kansas, to the petition of the plaintiff, this appellant, and for costs, was a valid and legal judgment.

3. Said supreme court of the state of Kansas erred in holding and adjudging that the petition of the plaintiff, this appellant, filed by it in the district court of Shawnee county, Kansas, in said case, did not state facts sufficient to constitute a cause of action.

4. Said supreme court of the state of Kansas erred in holding and adjudging that Chapter 125 of the Session Laws of the state of Kansas of 1913 constitutes a valid law and is not in conflict with that portion of Article I of the constitution of the United States which provides that "congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

5. The supreme court of the state of Kansas erred in holding and adjudging that said Chapter 135 of the laws of Kansas of 1913, as applied to and sought to be enforced against the capital stock of The Kansas City, Fort Scott and Memphis Railway Company invested in railroad property situated in Kansas and other states and with which interstate commerce is carried on, constitutes a valid law and is not in conflict with that portion of the fourteenth amendment to the constitution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

6. Said supreme court of the state of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913

was not a burden on or an attempt to regulate commerce among the several states.

7. Said supreme court of the state of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deprive the appellant, The Kansas City, Fort Scott & Memphis Railway Company, of property, without due process of law.

8. Said supreme court of the state of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deny to this appellant, The Kansas City, Fort Scott & Memphis Railway Company, the equal protection of the law.

9. Said supreme court of the state of Kansas erred in holding and adjudging that those provisions of Chapter 135 of the Session Laws of Kansas of 1913, relating to corporations organized under the laws of the state of Kansas, and whose capital stock was invested in property used in carrying on interstate commerce, were not a burden upon, or an attempt to regulate, the commerce in which this appellant was and is engaged among the several states, as alleged in its petition filed in the district court of Shawnee county, Kansas.

10. Said supreme court of the state of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, insofar as it applied to corporations organized under the laws of the state of Kansas, whose capital stock was invested in railroads extending into and through the state of Kansas and other states, which were used in carrying on interstate commerce, was not a burden upon or an attempt to regulate commerce among the several states.

11. Said supreme court of the state of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, insofar as it applied to corporations organized under the laws of the state of Kansas, whose capital stock was invested in railroads extending into and through the state of Kansas and other states, which were used in carrying on interstate commerce, was not a burden upon or an attempt to regulate commerce among the several states, in which this appellant was and is engaged.

Wherefore, as well for the foregoing as for other plain errors apparent on the face of the record, this appellant, The Kansas City, Fort Scott & Memphis Railway Company prays that the

said errors, and each of them, be corrected by the supreme court of the United States and said judgment so rendered by the supreme court of the state of Kansas, in which it affirmed the judgment of the district court of Shawnee county, Kansas, be reversed, set aside and held for naught, and for costs and such other and further relief as it may be entitled to in the premises.

R. R. VERMILION,

W. F. LILLISTON,

Attorneys for Appellant The Kansas City, Fort Scott & Memphis Railway Company.

19. Bond and Approval by Chief Justice of Supreme Court of Kansas.

20. Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the state of Kansas, before you, being the highest court of law and equity of the said state in which a decision could be had in said suit between The Kansas City, Fort Scott & Memphis Railway Company and J. T. Botkin, secretary of state of the state of Kansas, wherein was drawn in question the validity of a statute of said state of Kansas on the ground that said statute was repugnant to the constitution of the United States and more particularly to that portion of Article I of the constitution of the United States which provides that congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and more particularly to the fourteenth amendment to said constitution of the United States; and the decision was in favor of the validity of said state statute and wherein was drawn in question the construction of a clause of the constitution of the United States, and more particularly Section 1 of the fourteenth amendment to the constitution of the United States, and more particularly the above quoted portion of Article I of the constitution of the

United States, and the decision was against the right, privilege and immunity specially set up and claimed by said The Kansas City, Fort Scott & Memphis Railway Company; a manifest error hath happened to the great damage of the said The Kansas City, Fort Scott & Memphis Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same in the said supreme court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, chief justice of the supreme court of the United States, this 14th day of April, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,

*Clerk of the District Court of the
United States for the District of
Kansas, First Division.*

Allowed at Topeka, Kansas, on this April 14, 1915.

W. A. JOHNSTON,

*Chief Justice of the Supreme Court
of the State of Kansas.*

21. Citation.

Signed by W. A. JOHNSTON, *Chief Justice of the Supreme Court of the State of Kansas.*

22. United States of America, Supreme Court of Kansas, ss:

In obedience to the commands of the within writ I herewith transmit to the supreme court of the United States a duly certified transcript of the complete record and proceedings in

the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of Kansas, in the city of Topeka, Kansas, this 23d day of April, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of Kansas.

APPENDIX

JUDICIARY ACT OF 1789.

(1 Stat. L., p. 73.)

Chapter 20. An act to establish the Judicial Courts of the United States.

SECTION 1. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

SECTION 2. And be it further enacted, That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the state of Massachusetts which lies easterly of the state of New Hampshire, and to be called Maine district; one to consist of the state of New Hampshire, and to be called New Hampshire district; one to consist of the remaining part of the state of Massachusetts, and to be called Massachusetts district; one to consist of the state of Connecticut, and to be called Connecticut district; one to consist of the state of New York, and to be called New York district; one to consist of the state of New Jersey, and to be called New Jersey district; one to consist of the state of Pennsylvania, and to be called Pennsylvania district; one to consist of the state of Delaware, and to be called Delaware district; one to consist of the state of Maryland, and to be called Maryland district; one to consist of the state of Virginia, except that part called the district of Kentucky, and to be called Virginia district; one to consist of the remaining part of the state of Virginia, and to be called

Kentucky district; one to consist of the state of South Carolina, and to be called South Carolina district; and one to consist of the state of Georgia, and to be called Georgia district.

SECTION 3. And be it further enacted, That there be a court called a district court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a district judge, and shall hold annually four sessions. the first of which to commence as follows, to wit; in the districts of New York and of New Jersey on the first, in the district of Pennsylvania on the second, in the district of Connecticut on the third, and in the district of Delaware on the fourth, Tuesdays of November next; in the districts of Massachusetts, of Maine, and of Maryland, on the first, in the district of Georgia on the second, and in the districts of New Hampshire, of Virginia, and of Kentucky, on the third Tuesday of December next; and the other three sessions progressively in the respective districts on the like Tuesday of every third calendar month afterwards, and in the district of South Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday in December of each and every year, commencing in December next; and that the district judge shall have power to hold special courts at his discretion. That the stated district court shall be held at the places following, to wit: in the district of Maine, of Portland and Pownalsborough alternately, beginning at the first; in the district of New Hampshire, at Exeter and Portsmouth alternately, beginning at the first; in the district of Massachusetts, at Boston and Salem alternately, beginning at the first; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the first; in the district of New York, at New York; in the district of New Jersey, alternately at New Brunswick and Burlington, beginning at the first; in the district of Pennsylvania, at Philadelphia, and York Town alternately, beginning at the first; in the district of Delaware, alternately at Newcastle and Dover, beginning at the first; in the district of Maryland, alternately at Baltimore and Easton, beginning at the first; in the district of Virginia, alternately at Richmond and Williamsburgh, beginning at the first; in the district of Kentucky, at

Harrodsburgh; in the district of South Carolina, at Charleston; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first; and that the special courts shall be held at the same place in each district as the stated courts, or in districts that have two, at either of them, in the discretion of the judge, or at such other place in the district, as the nature of the business and his discretion shall direct. And that in the districts that have but one place for holding the district court the records thereof shall be kept at that place; and in districts that have two, at that place in each district which the judge shall appoint.

SECTION 4. And be it further enacted, That the before-mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. That the eastern circuit shall consist of the districts of New Hampshire, Massachusetts, Connecticut and New York; that the middle circuit shall consist of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and that the southern circuit shall consist of the districts of South Carolina and Georgia, and that there shall be held annually in each district of said circuits, two courts, which shall be called circuit courts, and shall consist of any two justices of the supreme court, and the district judge of such district, any two of whom shall constitute a quorum: Provided, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

SECTION 5. And be it further enacted, That the first session of the said circuit court in the several districts shall commence at the time following, to wit: In New Jersey on the second, in New York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh, days of April next; in Massachusetts on the third, in Maryland on the seventh, in South Carolina on the twelfth, in New Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth, days of May next, and the subsequent sessions in the respective districts on the like days of every sixth calendar month afterwards, except in South Carolina, where the session of the said

court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said circuit court shall be held in the district of New Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the district of Massachusetts, at Boston; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the last; in the district of New York, alternately at New York and Albany, beginning at the first; in the district of New Jersey, at Trenton; in the district of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the district of Delaware, alternately at New Castle and Dover, beginning at the first; in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia alternately at Charlottesville and Williamsburgh, beginning at the first; in the district of South Carolina, alternately at Columbia and Charleston, beginning at the first; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first. And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the supreme court.

SECTION 6. And be it further enacted, That the supreme court may, by any one or more of its justices being present, be adjourned from day to day until a quorum be convened; and that a circuit court may also be adjourned from day to day by any one of its judges, or if none are present, by the marshal of the district until a quorum be convened; and that a district court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to such day, antecedent to the next stated session of the said court, as in the said order shall be appointed; and in the case of the death of the said judge, and his vacancy not being supplied, all process, pleadings and proceedings of what nature soever, pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor.

SECTION 7. And be it (further) enacted, That the supreme court, and the district courts shall have power to appoint clerks for their respective courts, and that the clerk for each district court shall be clerk also of the circuit court in such district, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit: "I, A. B., being appointed clerk of ———, do solemnly swear, or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath. And the said clerks shall also severally give bond, with sufficient sureties (to be approved of by the supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk.

SECTION 8. And be it further enacted, That the justices of the supreme court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeable to the constitution and laws of the United States. So help me God."

SECTION 9. And be it further enacted, That the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of

admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

SECTION 10. And be it further enacted, That the district court in Kentucky district shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the supreme court in the same causes as from a circuit court to the supreme court, and under the same regulations. And the district court in Maine district shall, besides the jurisdiction hereinbefore granted, have jurisdiction of all causes, except of appeals and writs of error hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court. And writs of error shall lie from decisions therein to the circuit court in the district of Massachusetts in the same manner as from other district courts to their respective circuit courts.

SECTION 11. And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.

SECTION 12. And be it further enacted, That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district court next to be holden therein, or if in Kentucky district to the district court next to be holden therein, and offer good and

sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse (party) shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the beforementioned case of the removal of a cause into such court by an alien; and neither party removing the cause,

shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.

SECTION 13. And be it further enacted, That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul, shall be a party. And the trial of issues in fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury. The supreme court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

SECTION 14. And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial

before some court of the same, or are necessary to be brought into court to testify.

SECTION 15. And be it further enacted, That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.

SECTION 16. And be it further enacted, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

SECTION 17. And be it further enacted, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

SECTION 18. And be it further enacted, That when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court, a petition for a new trial. And if such petition be there filed within said term of forty-two

days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. And if a new trial be granted, the former judgment shall be thereby rendered void.

SECTION 19. And be it further enacted, That it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.

SECTION 20. And be it further enacted, That where in a circuit court, a plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs.

SECTION 21. And be it further enacted, That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district. Provided nevertheless, That all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court, next to be holden after each appeal in the district of Massachusetts.

SECTION 22. And be it further enacted, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the supreme court, the

adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the supreme court, the citation being in such case signed by a judge of such circuit court, or justice of the supreme court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.

SECTION 23. And be it further enacted, That a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and where, upon such writ of error the supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

SECTION 24. And be it further enacted, That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the

supreme court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.

SECTION 25. And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions

of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

SECTION 26. And be it further enacted, That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or nonperformance shall appear, by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

SECTION 27. And be it further enacted, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the supreme court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the district court of the United States, jointly and severally, with two good and sufficient sureties, inhabitant and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of ——— under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may

be) of the district of ———, during my continuance in said office, and take only my lawful fees. So help me God.”

SECTION 28. And be it further enacted, That in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed, is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: And the defaults or misfeasances in office of such deputy or deputies in the meantime, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs.

SECTION 29. And be it further enacted, That in cases punishable with death, the trial shall be had in the county where the offense was committed, or where that can not be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each state respectively according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such designation practicable by the courts

or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias* when directed by the court shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when from challenges or otherwise there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return *jurymen de talibus circumstantibus* sufficient to complete the pannel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint.

SECTION 30. And be it further enacted, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such persons may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or

superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court.

And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. Provided, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

SECTION 31. And be it (further) enacted, That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party

as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

SECTION 32. And be it further enacted, That no summons, writ, declaration, return, process, judgment or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion, and by their rules prescribe.

SECTION 33. And be it further enacted, That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such

court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state.

SECTION 34. And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

SECTION 35. And be it further enacted, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which

the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Approved, September 24, 1789.

JUDICIARY ACT OF 1875.

(18 Stat. L. 470.)

Chapter 137. An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of the suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts

of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SECTION. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects. either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

SECTION 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a state court to the circuit court of the United

States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be

allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SECTION 4. That when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SECTION 5. That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be.

SECTION 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such

suit in said circuit court as shall have been had therein in said state court prior to its removal.

SECTION 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the state court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action, or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause, shall be removable under this act shall have power to issue a writ of *certiorari* to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said

action, or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SECTION 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year

after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SECTION 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the supreme court, as provided in case of the death of a party after appeal taken or writ of error brought.

SECTION 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, March 3, 1875.

JUDICIARY ACT OF 1888.

(25 Stat. L. 433.)

Chapter 866. An act to correct the enrollment of an Act approved March third, eighteen hundred and eighty-seven, entitled, "An act to amend Sections one, two, three and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes, approved March third, eighteen hundred and seventy-five."

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the Act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend Sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state

courts, and for other purposes, approved March third, eighteen hundred and seventy-five," be, and the same is hereby amended so as to read as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the first section of an act entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' approved March third, eighteen hundred and seventy-five, be, and the same is hereby amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district court of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit,

except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

That the second section of said act be, and the same is hereby, amended so as to read as follows:

"SECTION 2. That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to

obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause; Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.

“At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto.

“Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.”

That Section three of said act be, and the same is hereby, amended so as to read as follows:

“SECTION 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the

removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.”

SECTION 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SECTION 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases, commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SECTION 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in Sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in

Section eight of the act of Congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

SECTION 6. That the last paragraph of Section five of the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes," and Section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: Provided, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any state, or suit commenced in any court of the United States. before the passage hereof except as otherwise expressly provided in this act.

SECTION 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

Approved, August 13, 1888.

JUDICIARY ACT OF 1891.

(26 Stat. L. 826.)

Chapter 517. An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That there shall be appointed by the president of the United States, by and with the advice and consent of the senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SECTION 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the supreme court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the supreme court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit court of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the treasury department of the United States in the same manner as is provided in respect of the costs and fees in the supreme court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SECTION 3. That the chief justice and the associate justices of the supreme court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the chief justice or an associate justice of the supreme court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the chief justice or associate justice of the supreme court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the chief justice or an associate justice of the supreme court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: Provided, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: in the first circuit, in the city of Boston; in the second circuit in the city of New York; in the third circuit in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SECTION 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SECTION 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.

SECTION 5. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts, in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall

decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SECTION 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal,

SECTION 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SECTION 9. That the marshal of the several districts in which said circuit court of appeals may be held shall, under the direction of the attorney general of the United States, and

with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, however, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the attorney general of the United States, may, from time to time lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

SECTION 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the supreme court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the supreme court the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

SECTION 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods

and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SECTION 12. That the circuit court of appeals shall have the powers specified in Section seven hundred and sixteen of the Revised Statutes of the United States.

SECTION 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the supreme court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SECTION 14. That Section six hundred and ninety-one of the Revised Statutes of the United States and Section three of an act entitled "An act to facilitate the disposition of cases in the supreme court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SECTION 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

RULE 1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES—ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

RULE 2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders, and other proceedings which are grantable of course.

RULE 3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "equity docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "order book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "equity journal," in which shall be entered all orders, decrees, and proceedings of the court in equity causes in term time.

Separate and suitable indices of the equity docket, order book, and equity journal shall be kept by the clerk, under the direction of court.

RULE 4.

NOTICE OF ORDERS.

Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order.

RULE 5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of *mesne* process or final process to enforce and execute decrees, for taking bills *pro confesso*, and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

RULE 6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders,

rulings, and proceedings for the advancement, conduct, and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

RULE 7.

PROCESS, MESNE AND FINAL.

The process of subpoena shall constitute the proper *mesne* process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and unless otherwise provided in these rules or specially ordered by the court a writ of attachment and, if the defendant can not be found, a writ of sequestration or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order^{or} or decree of the court.

RULE 8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall in all cases prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction, or decree for the specific performance of any act or contract

be not complied with, the court or a judge, besides, or instead of, proceeding against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

RULE 9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

RULE 10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in Rule 8 when the decree is solely for the payment of money.

RULE 11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

RULE 12.

ISSUE OF SUBPOENA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties

and be returnable into the clerk's office 20 days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

RULE 13.

MANNER OF SERVING SUBPOENA.

The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

RULE 14.

ALIAS SUBPOENA.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant until due service is made.

RULE 15.

PROCESS, BY WHOM SERVED.

The service of all process, *mesne* and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof.

RULE 16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by Rule 12. In default thereof the plaintiff may, at his election, take an order

as of course that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*.

RULE 17.

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.

When the bill is taken *pro confesso*, the court may proceed to a final decree at any time after the expiration of 30 days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct and submit to such other terms as the court shall direct for the purpose of speeding the cause.

RULE 18.

PLEADINGS—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules, the technical forms of pleadings in equity are abolished.

RULE 19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 20.

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated

in any pleading, may in any case be ordered upon such terms as to costs and otherwise as may be just.

RULE 21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent, or scandalous matter stricken out upon such terms as the court shall think fit.

RULE 22.

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

RULE 23.

MATTERS ORDINARILY DETERMINABLE AT LAW WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

RULE 24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures, shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

RULE 25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court or can not be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff or some one having knowledge of the facts upon which such relief is asked.

RULE 26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the court may order separate trials.

RULE 27.

STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which

he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees and, if necessary, of the shareholders, and the causes of his failure to obtain such action or the reasons for not making such effort.

RULE 28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

RULE 29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

RULE 30.

ANSWER—CONTENTS—COUNTERCLAIM.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims.

RULE 31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within 10 days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same

within 10 days from the filing thereof, and 10 days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill.

RULE 32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within 10 days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

RULE 33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off, or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

RULE 34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

RULE 35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

RULE 36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public.

RULE 37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the property of the main proceeding.

RULE 38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

RULE 39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

RULE 40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

RULE 41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

RULE 42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

RULE 43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within 14 days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill or to allow an amendment on such terms as justice may require.

RULE 44.

DEFECT OF PARTIES—TARDY OBJECTION.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

RULE 45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

RULE 46.

TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—RULINGS
ON OBJECTIONS TO EVIDENCE.

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by

statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

RULE 47.

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within 60 days from the time the cause is at issue; those of the defendant within 30 days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within 20 days after the time for taking original depositions expires.

RULE 48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADEMARK CASES.

In a case involving the validity or scope of a patent or trademark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within 40 days after the cause is at issue; those of the defendant within 20 days after

plaintiff's time has expired; and rebutting affidavits within 15 days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial; and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

RULE 49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing or in the form of narrative, and the witness shall be subject to cross-examination and re-examination.

RULE 50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

RULE 51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection

to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

RULE 52.

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER, OR EXAMINER.

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court, and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master, or examiner, or by counsel or solicitor the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

RULE 53.

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

RULE 54.

DEPOSITIONS UNDER REVISED STATUTES, SECTIONS 863, 865, 866, 867—CROSS-EXAMINATION.

After a cause is at issue depositions may be taken as provided by Sections 863, 865, 866, and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

RULE 55.

DEPOSITION DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published unless otherwise ordered by the court.

RULE 56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness can not be had orally on the trial, and why his deposition has not been before taken shall be set forth, together with the testimony which it is expected the witness will give.

RULE 57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term

by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

RULE 58.

DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff at any time after filing the bill and not later than 21 days after the joinder of issue, and the defendant at any time after filing his answer and not later than 21 days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered and the answers filed in the clerk's office within 15 days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party

or corporate officer interrogated. Within 10 days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served 10 days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter, or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter, or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

RULE 59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within 20 days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE 60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

RULE 61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, accounts, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

RULE 62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of congress, or

otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

RULE 63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

RULE 64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

RULE 65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

RULE 66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the equity docket. The parties shall have 20 days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period

filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

RULE 67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay \$5 costs to the other party, and for every exception allowed shall be entitled to the same costs.

RULE 68.

APPOINTMENT AND COMPENSATION OF MASTERS.

The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

RULE 69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of

appeals or the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

RULE 70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

RULE 71.

FORM OF DECREE.

In drawing up decrees and orders neither the bill nor answer nor other pleadings nor any part thereof nor the report of any master nor any other prior proceeding shall be recited or stated in the decree or order, but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" (Here insert the decree or order.)

RULE 72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before the close of the term at which final decree is rendered be corrected by order of the court or a judge thereof upon petition without the form or expense of a rehearing.

RULE 73.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining

order be granted without notice to the opposite party unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than 10 days from the date of the order, and shall take precedence of all matters except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

RULE 74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree in an equity suit granting or dissolving an injunction is allowed by a justice or a judge who took part in the decision of the cause he may, in his discretion, at the time of such allowance make an order suspending, modifying, or restoring the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

RULE 75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a praecipe which shall

indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his praecipe also within 10 days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least 10 days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete, and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject.

RULE 76.

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS— CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents, and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If in the transcript anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

RULE 77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

RULE 78.

AFFIRMATION IN LIEU OF OATH.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

RULE 79.

ADDITIONAL RULES BY DISTRICT COURT.

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings, and process, *mesne* and final, in their respective districts not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

RULE 80.

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

RULE 81.

THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES
ABROGATED.

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which can not be changed without doing substantial injustice the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules heretofore prescribed by the supreme court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

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